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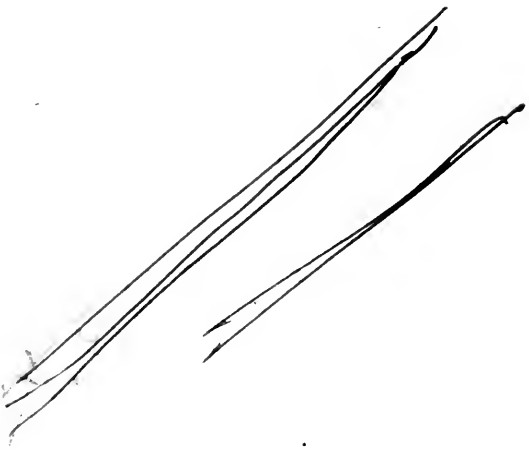

THE LAW

OF

MUNICIPAL CORPORATIONS.

CASES ON SELECTED TOPICS

IN

THE LAW

OF

MUNICIPAL CORPORATIONS.

BY

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PREFACE.

THE selection of cases has been made with special reference to the wants of the class at the Harvard Law School, where the time allotted for class-room work upon the entire subject of Municipal Corporations does not usually exceed ten hours. Hence some important topics are omitted altogether, while others are not fully dealt with.

JEREMIAH SMITH.

APRIL, 1898.

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SELECT CASES

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MUNICIPAL CORPORATIONS.

CHAPTER I.

LEGISLATIVE CONTROL OVER MUNICIPAL CORPORATIONS.[1]

SECTION. I. — *Creation, Annexation, Division, and Abolition.*

BERLIN *v.* GORHAM.

1856. 34 *New Hampshire*, 266.[2]

ASSUMPSIT, to recover for supplies furnished for the support of Jeremiah Harding, and his wife Nancy Harding, alleged to be paupers having their settlement in Gorham.

The plaintiffs gave evidence that when Gorham was incorporated, on the 18th of June, 1836, Jeremiah Harding resided and had his home in the place which was incorporated into that town. The court ruled that if he so resided, he would thereby gain a settlement in Gorham, although no legal town meeting was holden, and though no town officers were chosen, before his removal.

The defendant excepted to the foregoing ruling, and moved that the verdict returned for the plaintiffs be set aside.

Bellows & Fletcher, for defendant.

G. C. Williams, for plaintiff.

BELL, J. By the statute of 1828, (Laws, Ed. 1830, p. 301,) relating to the settlement of paupers, which is reënacted without material change in the Revised Statutes, ch. 65, sec. 1, cl. 6, (Comp. Stat. 157,) "all persons, dwelling and having their homes in any unincorporated place at the time when the same shall be incorporated into a town,

[1] How far the acts of the Legislature can affect the rights and remedies of creditors of municipal corporations, is a question dealt with in some of the cases given under Chapter II. The cases in the present chapter discuss the question of legislative control as affecting the municipalities and their inhabitants. — ED.

[2] Only so much of the case is given as relates to a single point. The arguments are omitted. — ED.

shall thereby gain a settlement therein." It was objected that to make an incorporation of a town effectual, there must be a legal town meeting holden in it; and as the pauper, though he resided in the town at the passage of the act, removed before any meeting was holden, he did not gain a settlement. This objection rests upon the idea that the rule which applies in the case of private corporations, that the act is ineffectual until it is accepted by the corporators, governs also the case of public corporations, like towns. See A. & A. on Corp. 68.

But there is no such rule in the case of public corporations of a municipal character. The acts of incorporation are imperative upon all who come within their scope. Nothing depends upon consent, unless the act is expressly made conditional. No man who lives upon the incorporated district can withdraw from the corporation, unless by a removal from the town; and by the mere passage of the law the town is completely constituted, entitled to the rights and subjected to the duties and burdens of a town, whether the inhabitants are pleased or displeased. The Legislature has entire control over municipal corporations, to create, change, or destroy them at pleasure, and they are absolutely created by the act of incorporation, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself. *The People* v. *Wren*, 4 Scam. 269; *Warren* v. *Mayor, &c. of Charlestown*, 2 Gray, 104; *Mills* v. *Williams*, 11 Iredell, 558; *The State* v. *Curran*, 7 Eng. 321; *Fire Department* v. *Kip*, 10 Wendell, 267; *The People* v. *Morris*, 13 Wendell, 337.

. . . . . .

Judgment on the verdict.

CHANDLER *v.* BOSTON.

1873. 112 *Massachusetts*, 200.[1]

Colt, J. The plaintiffs, residents and tax payers in the town of Brookline, and claiming the privileges and immunities which they are entitled to under a town government, allege by bill in equity that the act providing for the annexation of that town to the city of Boston, on certain conditions, is a violation of the provisions of the second article of the amendments of the Constitution of this Commonwealth, by which power is given to the General Court on certain conditions to charter cities. An injunction is asked to prevent proceedings by the city or town under the act, with a prayer that it may be declared void, and for general relief. To this there is a general demurrer for want of equity.

The question whether this court has jurisdiction to grant the relief asked in favor of private citizens against the contemplated alleged illegal action of these municipalities, was not argued and is not considered by us.

[1] Statement and arguments omitted. — Ed.

By the amendment of the Constitution relied on, power is given to the General Court to erect city governments in any "corporate town or towns of this Commonwealth," and to confer such powers as may be necessary for the government thereof, with the proviso that "no such government shall be erected in any town not containing twelve thousand inhabitants, nor unless it be with the consent and on the application of a majority of the inhabitants of such town present and voting thereon."

The bill alleges that the town of Brookline did not contain twelve thousand inhabitants, and that the act in question was passed by the Legislature without first obtaining the consent and without the application of a majority of the inhabitants of the town.

The court are of opinion that the demurrer is well taken. The control of the General Court over the territorial division of the State into cities, towns, and districts, unless controlled by some specific constitutional limitation, must necessarily be supreme. It is incident to that sovereign power which regulates the performance of public and political duties. The rights and franchises of such corporations are granted only to this end, and they may be modified and changed in their territorial limits as public convenience and necessity require. The inhabitants do not derive private or personal rights under the act of incorporation; they acquire no vested right in those forms of municipal government which exist under general laws in towns, as distinguished from those by which the affairs of cities are regulated. If injuriously affected by legislative action upon these political relations, within constitional limits, the courts can afford no remedy.

This power of the General Court it was not the intention of the amendment in question to limit or affect. It has no application to the annexation, by the authority of the Legislature, of a town or part of a town to a city already existing. It has express reference to the erection of a city government in the place of a town government within the same town limits. We are referred by the defendants to many acts of the Legislature annexing towns and parts of towns to cities, showing that this has been the uniform construction of the article in question.

Demurrer sustained.

LARAMIE COUNTY *v.* ALBANY COUNTY.

1875. 92 *U. S.* 307.

Appeal from the Supreme Court of the Territory of Wyoming.

Mr. W. R. Steele, for the appellants.

Mr. A. H. Jackson, *contra*.

Mr. Justice Clifford delivered the opinion of the court.

Counties, cities, and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State

otherwise provides. Beyond doubt, they are, in general, made bodies politic and corporate; and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.

Trusts of great moment, it must be admitted, are confided to such municipalities; and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature; but it is settled law, that the legislature, in granting it, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. Unless the Constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. Cooley on Const., 2d ed., 192.

Sufficient appears to show that the complainant county was first organized under the act of the 3d of January, 1868, passed by the legislature of the Territory of Dacotah, which repealed the prior act to create and establish that county. When organized, the county was still a part of the Territory, and embraced within its territorial limits all the territory now comprising the counties of Laramie, Albany, and Carbon, in the Territory of Wyoming, — an area of three and one-half degrees from east to west, and four degrees from north to south. Very heavy expenses, it seems, were incurred by the county during that year and prior thereto, greatly in excess of their current means, as more fully explained in the bill of complaint, which increased the indebtedness to the sum of $28,000. Other liabilities, it is alleged, were also incurred by the authorities of the county during that period, which augmented their indebtedness to the sum of $40,000 in the aggregate.

Pending these embarrassments, the charge is, that the legislature of the Territory passed two acts on the same day, — to wit, Dec. 16, 1868, — creating the counties of Albany and Carbon out of the western portion of the territory of the complainant county, reducing the area of that county more than two-thirds; that, by the said acts creating said new counties, fully two-thirds of the wealth and taxable property previously existing in the old county were withdrawn from its jurisdiction, and its limits were reduced to less than one-third of its former size, without any provision being made in either of said acts that the new counties, or either of them, should assume any proportion of the debt and liabilities which had been incurred for the welfare of the whole before these acts were passed.

Payment of the outstanding debt having been made by the complainant county, the present suit was instituted in her behalf to compel the new counties to contribute their just proportion towards such indebtedness. Attempt is made to show that an equitable cause of action exists in the case by referring to the several improvements made in that part of the Territory included in the new counties before they were incorporated, and by referring to the great value of the property withdrawn from taxation in the old county, and included within the limits of the newly-created counties.

Process was served, and the respondents appeared and filed separate demurrers to the bill of complaint. Hearing was had in the District Court of the Territory, where the suit was commenced; and the court entered a decree sustaining the demurrers, and dismissing the bill of complaint. Immediate appeal was taken by the complainant to the Supreme Court of the Territory, where, the parties having been again heard, the Supreme Court entered a decree affirming the decree of the District Court, and the present appeal is prosecuted by the complainant.

Two errors are assigned, as follows: (1.) That the Supreme Court erred in affirming the decree of the District Court sustaining the demurrers of the respondents to the bill of complaint. (2.) That the Supreme Court erred in rendering judgment for the respondents.

Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the State; and it is well-settled law, that the charters under which such corporations are created may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand. 2 Kent, Com., 12th ed., 305; Angell & Ames on Corp., 10th ed., sect. 31; *McKim* v. *Odom*, 3 Bland, 407; *St. Louis* v. *Allen*, 13 Mo. 400; *The Schools* v. *Tatman*, 13 Ill. 27; *Yarmouth* v. *Skillings*, 45 Me. 141.

Such corporations are composed of all the inhabitants of the Territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. 1 Greenl. Ev., 12th ed., sect. 331.

Corporate rights and privileges are usually possessed by such corporations; and it is equally true that they are subject to legal obligations and duties, and that they are under the entire control of the legislature, from which all their powers are derived. Sixty-five years before the decree under review was rendered, a case was presented to the Supreme Court of Massachusetts, sitting in Maine, which involved the same principle as that which arises in the case before the court. Learned counsel were employed on both sides, and Parsons was Chief Justice of the Court, and delivered the opinion. First he adverted to the rights

and privileges, obligations and duties, of a town, and then proceeded to say, "If a part of its territory and inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the act authorizing the separation." *Windham* v. *Portland*, 4 Mass. 389.

Decisions to the same effect have been made since that time in nearly all the States of the Union where such municipal subdivisions are known, until the reported cases have become quite too numerous for citation. Nor are such citations necessary, as they are all one way, showing that the principle in this country is one of universal application. Concede its correctness, and it follows that the old town, unless the legislature otherwise provides, continues to be seized of all its lands held in a proprietary right, continues to be the sole owner of all its personal property, is entitled to all its rights of action, is bound by all its contracts, and is subject to all the duties and obligations it owed before the act was passed effecting the separation.

Suppose that is so as applied to towns: still it is suggested that the same rule ought not to be applied to counties; but it is so obvious that the suggestion is without merit, that it seems unnecessary to give it any extended examination. *County of Richland* v. *County of Lawrence*, 12 Ill. 8.

Public duties are required of counties as well as of towns, as a part of the machinery of the State; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text-writers upon the subject and the great weight of judicial authority.

Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon any thing like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with every thing of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at its pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. *School Society* v. *School Society*, 14 Conn. 469; *Bridge Co.* v. *East Hartford*, 16 id. 172; *Hampshire* v. *Franklin*, 16 Mass. 76; *North Hemstead* v. *Hemstead*, 2 Wend. 109; *Montpelier* v. *East*

Montpelier, 29 Vt. 20; *Sill* v. *Corning*, 15 N. Y. 197; *People* v. *Draper*, id. 549; *Waring* v. *Mayor*, 24 Ala. 701; *Mayor* v. *The State*, 15 Md. 376; *Ashby* v. *Wellington*, 8 Pick. 524; *Baptist So.* v. *Candia*, 2 N. H. 20; *Denton* v. *Jackson*, 2 Johns. Ch. 320.

Political subdivisions of the kind are always subject to the general laws of the State; and the Supreme Court of Connecticut decided that the legislature of that State have immemorially exercised the power of dividing towns at their pleasure, and upon such division to apportion the common property and the common burdens as to them shall seem reasonable and equitable. *Granby* v. *Thurston*, 23 Conn. 419; *Yarmouth* v. *Skillings*, 45 Me. 142; *Langworthy* v. *Dubuque*, 16 Iowa, 273; *Justices' Opinion*, 6 Cush. 577.

Such corporations are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, deriving even their existence from the legislature. Their officers are nothing more than local agents of the State; and their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated. *Russel* v. *Reed*, 27 Penn. St. 170.

Civil and geographical divisions of the State into counties, townships, and cities, said Thompson, C. J., had its origin in the necessities and convenience of the people; but this does not withdraw these municipal divisions from the supervision and control by the State in matters of internal government. Proof of that is found in the fact that the legislature often exercises the power to exempt property liable to taxation, and in many other instances imposes taxes on what was before exempt, or increases the antecedent burdens in that behalf. It changes county sites, and orders new roads to be opened and new bridges to be built at the expense of the counties; and no one, it is supposed, disputes the exercise of such powers by the legislature. *Burns* v. *Clarion County*, 62 Penn. St. 425; *People* v. *Pinkney*, 32 N. Y. 393; *St. Louis* v. *Russell*, 9 Mo. 507.

Old towns may be divided, or a new town may be formed from parts of two or more existing towns; and the legislature, if they see fit, may apportion the common property and the common burdens, even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation. *Bristol* v. *New Chester*, 3 N. H. 521.

In dividing towns, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, may extend or abridge their privileges, and may impose new liabilities. Towns, says Richardson, C. J., are public corporations, created for purposes purely public, empowered to hold property, and invested with many functions and faculties to enable them to answer the purposes of their creation.

There must, in the nature of things, be reserved, by necessary implication, in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity; and we have the authority of that learned judge for saying that it has been the constant usage, in all that section of the Union, to enlarge or curtail the power of towns, divide their territory, and make new towns, whenever the convenience of the public requires that such a change should be made.

Half a century ago, when that decision was made, the authority of the legislature to make such a division of a municipal corporation was deemed to be without doubt; and the same court decided that the power to divide the property of a municipal corporation is necessarily incident to the power to divide its territory and to create the new corporation. *Darlington* v. *Mayor*, 31 N. Y. 195; *Clinton* v. *Railroad*, 24 Iowa, 475; *Layton* v. *New Orleans*, 12 La. Ann. 516.

Cases doubtless arise where injustice is done by annexing part of one municipal corporation to another, or by the division of such a corporation and the creation of a new one, or by the consolidation of two or more such corporations into one of larger size. Examples illustrative of these suggestions may easily be imagined. (1.) Consolidation will work injustice where one of the corporations is largely in debt and the other owes nothing, as the residents in the non-indebted municipality must necessarily submit to increased burdens in consequence of the indebtedness of their associates. (2.) Like consequences follow where the change consists in annexing a part of one municipal corporation to another, in case the corporation to which those set off are annexed is greatly more in debt than the corporation from which they were set off.

Hardships may also be suffered by the corporation from which a portion of its inhabitants, with their estates, may be set off, in case the corporation is largely in debt, as the taxes of those who remain must necessarily be increased in proportion as the polls and estates within the municipality are diminished. Even greater injustice may arise in cases where the legislature finds it necessary to circumscribe the jurisdiction of a county or town by dividing their territory, and creating new counties or towns out of the territory withdrawn from their former boundaries.

Legislative acts of the kind operate differently under different circumstances. Instances may be given where the hardship is much the greatest towards the new municipality, as where the great body of the property and improvements are left within the new boundaries of the old corporation. Other cases are well known where the hardship is much greater towards the old corporation, as where the newly-created subdivision embraces within its boundaries all the public buildings and most of the public improvements and the most valuable lands. Circumstances of the kind, with many others not mentioned, show beyond doubt that such changes in the subdivisions of a State often present

matters for adjustment involving questions of great delicacy and difficulty.

Allusion was made to this subject by the Supreme Court of New Hampshire in the case to which reference has already been made. 3 N. H. 534. Speaking of the power to divide towns, the court in that case say that the power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided is incident to the power to divide the territory, and is *in its nature purely legislative.* No general rule can be prescribed by which an equal and just decision in such cases can be made. Such a division, say the court in that case, must be founded upon the circumstances of each particular case; and in that view the court here entirely concurs. *Powers* v. *Commissioners of Wood County*, 8 Ohio St. 290; *Shelby County* v. *Railroad*, 5 Bush, 228; *Olney* v. *Harvey*, 50 Ill. 455.

Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim. *North Hemstead* v. *Hemstead*, 2 Wend. 134; Dil. on Mun. Corp., sect. 128; *Wade* v. *Richmond*, 18 Gratt. 583; *Higginbotham* v. *Com.*, 25 id. 633.

Tested by these considerations, it is clear that there is no error in the record.

Decree affirmed.

JOHNSON ET AL. *v.* CITY OF SAN DIEGO.

1895. 109 *California*, 468.[1]

By virtue of the act of the legislature of March 19, 1889, and of a vote at an election held thereunder, a portion of the territory formerly embraced within the corporate limits of the city of San Diego was excluded therefrom. The said act of 1889, as interpreted by the court, also provided that the segregated territory (which was known as the Coronado beach) should, after exclusion, be liable for its *pro rata* share of the indebtedness of the original municipal corporation contracted prior to such exclusion.

In 1893 (*Statutes* 1893, p. 536) the legislature passed an act pro-

[1] Statement abridged from opinion. Arguments omitted. — ED.

viding for "the adjustment, settlement, and payment of any indebtedness existing against any city or municipal corporation at the time of exclusion of territory therefrom and the division of property thereof."

Under this act, any territory which "has been or shall be" excluded from any municipal corporation shall not be subject to the payment of any indebtedness existing at the time of exclusion, if the court find that the value of the property belonging to said municipal corporation, and which remains within the boundaries thereof after such exclusion, exceeds the value of municipal property situated in such excluded territory, and also exceeds the *pro rata* portion of the indebtedness of the municipal corporation due from such excluded territory as shown by the assessment made immediately preceding such exclusion.

Plaintiffs availed themselves of the provisions of this act to have the court determine what proportion, if any, of the bonded indebtedness of San Diego was properly chargeable against the excluded territory. Under certain findings of fact, and in strict accord with the dictates of the statute, the court adjudged that there was nothing due or to become due from the excluded territory to the city.

The city of San Diego appealed from the judgment.

William H. Fuller and *Clarence L. Barber*, for appellant.

Gibson & Titus, and *Samuel M. Shortridge*, for respondent.

HENSHAW, J. [After stating the case.] The chief contention of the defendant, raised upon demurrer, pressed in its motion for a nonsuit and urged against the judgment, may be thus stated: The property owners of the city and the property owners of the excluded territory, when in accordance with the permissive act of the legislature (Stats. 1889, p. 356) they elected to segregate Coronado beach, did so under a contract expressed in the act itself, by which the property owners of the excluded territory were allowed to remove their land from the jurisdiction of the city with the understanding that they should continue to pay their *pro rata* share of the municipal debts existing at the time of the exclusion; that the rights of the city vested under this contract cannot be destroyed or impaired by subsequent legislation, and that therefore to the parties to this controversy the statute of 1893 has no applicability.

. . . . . .

The question that is left for consideration is that of the power of the legislature to change and readjust the burden of such an indebtedness, after having in the act of separation declared in what manner it should be borne.

Municipal corporations in their public and political aspect are not only creatures of the state, but are parts of the machinery by which the state conducts its governmental affairs. Except, therefore, as restrained by the constitution, the legislature may increase or diminish the powers of such a corporation — may enlarge or restrict its territorial jurisdiction, or may destroy its corporate existence entirely. Says Cooley: "Restraints on the legislative power of control must be

found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to right through the ballot-box all these wrongs." (Cooley on Constitutional Limitations, 6th ed., 229.)

"A city," says Mr. Justice Field, in *New Orleans* v. *Clark*, 95 U. S. 644, "is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged according to the requirements of the public, and which may be increased or repealed at the will of the legislature."

This right of legislative control, arising from the very nature of the creation of such corporations, is established under the well-settled doctrine that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes, or as Dillon states it: "Legislative acts respecting the political and governmental powers of municipal corporations not being *in the nature of contracts*, the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded." (Dillon on Municipal Corporations, 4th ed., sec. 63.)

The act of the legislature in relieving Coronado beach from the corporate control of San Diego, and in adjusting the burden of the city's debt, was undoubtedly the exercise of a proper power directed to the political and governmental affairs of the municipality. That the legislature by the terms of the act segregating the territory had the right to dispose of the common property, and provide the mode and manner of the payment of the common debt, imposing its burden in such proportions as it saw fit, is a proposition undisputed and undisputable. It is equally well-settled law that when the act of segregation is silent as to the common property and common debts, the old corporation retains all the property within its new boundaries, and is charged with the payment of all of the debts. Upon these two propositions the cases are both numerous and harmonious. (*People* v. *Alameda County*, 26 Cal. 641; *Hughes* v. *Ewing*, 93 Cal. 414; *Los Angeles County* v. *Orange County*, 97 Cal. 329; *Town of Depere* v. *Town of Bellevue*, 31 Wis. 120; 11 Am. Rep. 602; *Laramie County* v. *Albany County*, 92 U. S. 307; *Lycoming* v. *Union*, 15 Pa. St. 166; 53 Am. Dec. 575; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514; *Layton* v. *New Orleans*, 12 La. Ann. 515; *Beloit* v. *Morgan*, 7 Wall. 619.)

There is authority, however, holding that when the legislature has spoken in the original act, rights vest under it which may not be impaired, and it is upon these cases that appellants rely.

Thus in *Bowdoinham* v. *Richmond*, 6 Me. 112, 19 Am. Dec. 197, the supreme court of Maine decided in 1829 that as the act of the legislature dividing the town of Bowdoinham and incorporating a part of it into a new town by the name of Richmond, enacted that the latter

should be held to pay its proportion toward the support of all paupers then on expense in Bowdoinham, a later act exonerating the new town from this liability was void. The court held that by the former act a vested right of action arose in favor of the old town against the new, and that the later act in destroying this right impaired the obligation of the contract on the part of Richmond created by the first act. Just how the court reached the conclusion that a contract was created by the first act is not plain, but it seems to have been based somewhat upon the conviction that the assent of the old town was necessary to the segregation.

The opinion, however, looks for authority to the case of *Hampshire County* v. *Franklin County*, 16 Mass. 76, decided in 1819. In that case the legislature had created the county of Franklin out of territory formerly a part of the county of Hampshire. The act was silent as to the disposition of the public property and the public debt. By an act passed two years later the legislature provided in effect that if at the time of the segregation there were funds belonging to the county of Hampshire in excess of its debts, the new county should be entitled to such proportion of those funds as the assessed value of the property of the new county bore to the assessed value of the property of the old. The supreme court decided in accordance with the undoubted rule that as the first act was silent upon the subject, all of the common property within its limits belonged to the old county, which was likewise charged with all existing debts. It further held that rights vested under this act, and that the later act providing for an apportionment violated these rights in attempting to give the property of Hampshire to Franklin county; in other words, that the later act created a debt from Hampshire to Franklin county, which before had not existed.

It is to be noticed that in this case the original act was silent as to common property and debts, but as in such case the law steps in and makes disposition of them, the silence was deemed equivalent to an affirmative declaration of the legislature making disposition which could not afterward be modified.

But distinguished as are the courts which have announced this doctrine, their views have not been followed, and the decisions themselves have been elsewhere criticised and rejected, until it may be safely said that it is the general rule that where the original act does not make disposition of the common property and debts the legislature may at any subsequent time by later act apportion them in such manner as seems to be just and equitable.

Under the decisions adopting this rule the theory of vested rights and contractual relations is rejected as being a false quantity in the dealings of the sovereign state with its governmental agents and mandatories. And while it is not denied that the state may make a contract with a municipal corporation, or may permit municipal corporations to enter into binding contracts with each other, which contracts

it cannot impair, these contracts must be in their nature private, although the public may derive a common benefit from them, and the contracting cities are as to them measured by the same rules and entitled to the same protection as would a private corporation. The subject of such a contract, however, can never be a matter of municipal polity or of civil or political power, for the legislature itself cannot surrender its supremacy as to these things and thus abandon its prerogatives and strip itself of its inherent and inalienable right of control.

Of the cases so holding, either directly or impliedly, a few may profitably be mentioned. [The court here referred to *County of Richland* v. *County of Lawrence*, 12 Ill. 1; *Perry County* v. *Conway County*, 52 Ark. 430; *Dunmore's Appeal*, 52 Pa. State, 430; *Layton* v. *New Orleans*, 12 La. Ann. 515; and *Mayor of Baltimore* v. *State*, 15 Maryland, 376.]

Says Dillon on Municipal Corporations, fourth edition, section 189: "But upon *the division of the old corporation*, and the creation of a new corporation out of a part of its inhabitants and territory, or upon the annexation of part of another corporation, the *legislature may provide* for an *equitable apportionment or division* of the property and impose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts. The *charters and constituent acts* of public and municipal corporations are not, as we have before seen, contracts, *and they may be changed at the pleasure of the legislature*, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division, and, incidental to this, to apportion their property and direct the manner in which their debts or liabilities shall be met and by whom. The opinion has been expressed that the partition of the property *must be made at the time of the division* of or change in the corporation, since otherwise the old corporation becomes, under the rule just above stated, the sole owner of the property, and hence cannot be deprived of it by a *subsequent* act of the legislature. But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporate bodies, divisions, and parts, and with several well-considered adjudications."

To the same general effect are the cases of *Laramie County* v. *Albany County*, *supra*; *Mount Pleasant* v. *Beckwith*, *supra*; *Scituate* v. *Weymouth*, 108 Mass. 128; *Willimantic School Society* v. *First School Society*, 14 Conn. 457; *Guilford* v. *Supervisors*, 13 N. Y. 143.

In this state the power of the legislature to make such subsequent adjustments was early declared in *People* v. *Alameda County*, *supra*. Alameda county was created out of the territory of Contra Costa county in 1853. At the time of the separation Contra Costa county

owed for a bridge which had been constructed upon the territory set apart to Alameda county. The original act made no provision for the payment of this indebtedness, which thus remained a charge against the old county. By two separate later acts the legislature provided for the apportionment of the debt, putting a part of the burden upon Alameda county. These acts were upheld as a proper exercise of legislative power.

And, indeed, it is not easy to see how the opposite view can be maintained. Since the legislative power, within constitutional limitations, is supreme in the matter; since, in the first apportionment the people affected are entitled to no voice (except through their representatives), and since the act of the legislature is not in the nature of a contract, it cannot logically be held that the power has been exhausted by its first exercise. The right still remains to make such future adjustments as the equities may suggest.

Nor in the operation of the act in question upon the city of San Diego can we perceive any hardship. It had at the time of the segregation six hundred thousand dollars, acquired while Coronado beach was a part of its territory, and partially acquired, doubtless, by taxation upon this land. All of this property it retains. All of the moneys evidenced by the bonded indebtedness were expended within its present territorial limits, and no dollar of it went to improve the excluded territory. Having all of the common property and all of the fruits of the common debt, it is certainly not onerous or oppressive that it should be asked to pay for what has been expended for its exclusive benefit. In a certain sense, it is true that Coronado beach was also benefited by these expenditures. In the same sense San Mateo county is benefited by the public improvements of the city and county of San Francisco, but it has never been asserted that for such benefits a sister county should be called upon to pay.

The judgment and order appealed from are affirmed.

HARRISON, J., TEMPLE, J., VAN FLEET, J., GAROUTTE, J., and BEATTY, C. J., concurred.

BLOOMFIELD *v.* GLEN RIDGE.

1896. 54 *New Jersey Equity*, 276.[1]

BILL in equity, by Inhabitants of the Township of Bloomfield against the Mayor and Council of the Borough of Glen Ridge; praying for an injunction, restraining defendants from interfering with the complainant's sewers within the limits of the borough and from exercising any management over such sewers. The allegations of the bill are sufficiently stated in the opinion.

Defendants demurred.

[1] Statement abridged.— ED.

George S. Hilton, for complainant.

Joseph G. Gallagher and *Joseph Coult*, for defendants.

REED, V. C. It appears that the township of Bloomfield, together with the city of Orange and the township of Montclair, built an outlet sewer, each to pay its proportion of the expenses; that Bloomfield has raised its proportion by issuing bonds, which are still outstanding. It appears that the township of Bloomfield also constructed lateral sewers through its streets and paid for them $30,863.97.

It appears that since the construction of these sewers, a new borough has been organized, called the borough of Glen Ridge. It also appears that a portion of the territory of the township of Bloomfield has been included within the limits of the new borough, and that a number of streets in which these lateral sewers were placed, are now within the territorial limits of the borough. The question which the bill attempts to raise is, whether the right to control the use of such sewers as now lie within the borough, has passed to the borough government, or whether it still resides in the township authority.

The contention on the part of the township is, that it paid for these laterals, and is liable to pay for its part of the cost of the main sewer, by means of which the laterals became usable; that the title in the laterals still resides in it, and that it has the right to control and use its own property.

It is stated in the bill, for the purpose of adding to the force of this contention, that these sewers were built to be operated as a single system, and that it has, under a contract with the township of Montclair, become liable to pay a proportionate share of the expense of building and maintaining the sewer through the territory of Glen Ridge. I do not perceive that these facts can influence the decision of the question in hand. The sewers must be regarded as any other corporate property for which the municipality has paid, or for which it is liable to pay, either by reason of its outstanding bonds or by the terms of a contract still outstanding. It is corporate property, and the query is, to whom does the right to use and control it belong after it is thrown into the new municipality? Many of the questions which spring out of the divisions of the territory of a municipality in respect to the property of the old municipality are entirely settled. For instance, it is settled that the legislature, by virtue of its control over municipal corporations, has the ability to fix the rights of the new and the old corporations in the property, and to adjust the burden of the corporate debts. *Dill. Mun. Corp.* § 127.

It is also settled that where no legislative adjustment is provided for, then the old corporation remains liable for all the debts. *Dill. Mun. Corp.* § 128. It is also settled that all transitory property, such as bonds, money in sinking funds and property of that class, and all real estate that lies within the limits of the old corporation, remains the property of the old municipality.

But in respect to property used for public purposes, such as engine-

houses, school-houses, public markets, which are located upon lands which fall within the limits of the new corporation, there exists some contrariety of judicial sentiment. There are cases which hold that the old corporation is not stripped of its title to such property. In *Whitier* v. *Sanborn*, 38 *Me.* 32, it was held that the alterations of the lines of the school district, whereby a school-house was left in another district, would not change the right of property therein. It was also said, *obiter*, in *School District* v. *Richardson*, 23 *Pick.* 62, that the alteration of the lines of a school district would not change the property rights of the old district in a school-house thrown outside of its limits.

In *Board of Health of Buena Vista Township* v. *City of East Saginaw*, 45 *Mich.* 257, land had been conveyed to the board of health in trust for cemetery purposes for the township of Buena Vista. Afterwards, the city of East Saginaw was incorporated, including the cemetery. The court held that there was no common-law rule by which property can be transferred from one corporation to another without a grant, and as there was no statute, the property was unaffected by the change of corporate lines.

In *Winona* v. *School District No.* 82, 40 *Minn.* 13, a school-house, by the alteration of the city lines, had been thrown within the city limits; it was held that the old district still retained title to the school-house. The opinion of this case reviews, exhaustively, the cases which have dealt with the subject. These cases, as is perceived, involve the question of title to school-houses, cemeteries, and ministers' houses, which, by reason of the manner in which, and the purpose for which, they are usable, may possibly be distinguishable from other kinds of municipal property lying within the new territory. But the reasoning upon which some of the cases go, viz., that there is no other way by which the old corporation can be deprived of its title except through its own grant or by express legislation, seems to include, within the rule announced, property of all kinds.

Opposed to the theory of these cases, there are *dicta* of great weight in favor of an opposite rule as the better one, viz., that property fixed to the land within the new corporation becomes the property of that municipality. The cases in which this doctrine has been asserted or approved are the following: *Bridge Company* v. *East Hartford*, 16 *Conn.* 171; *School District* v. *Tapley*, 1 *Allen*, 48; *Laramie County* v. *Albany County*, 92 *U. S.* 315; *Mount Pleasant* v. *Beckwith*, 100 *U. S.* 525; *Board* v. *Board*, 30 *W. Va.* 424; *North Hempstead* v. *Hempstead*, 2 *Wend.* 109.

In my judgment, the cases which hold that the right to control this kind of property remains still in the old corporation, press unduly the notion that there must be an express grant or express legislation to pass control over such property to the new municipality. The title held by a municipality is of a peculiar kind. It is held by the corporation as a trustee for the public. Municipal corporations are

organized for the purpose of creating agencies for the purchase, construction, and operation of such appliances as are essential to the health, safety, and convenience of the people and their property. The appliances so created, whether engine-house, market-house, school-house, lamps, water-pipes, hydrants, sewers, are so distributed as to be of the most efficient service to the public; they are brought into existence to be so used. Now, when the territorial limits of a corporation are diminished by the excision of a part of its territory, the power of control of the public agent over those appliances is restricted to the newly-defined limits of the corporation. This is admittedly so, unless the legislature does what is unusual, confers a power upon its agents to act extra-territorially. It is entirely settled that the powers of city officers are extended or restricted in conformity with the change of the boundaries of a municipality. *Ehrgott* v. *Mayor of New York*, 96 *N. Y.* 264; *St. Louis Gaslight Co.* v. *St. Louis*, 46 *Mo.* 121; *Town of Toledo* v. *Edens*, 59 *Iowa*, 352; *Coldwater* v. *Tucker*, 36 *Mich.* 474; *Strauss* v. *Pontiac*, 40 *Ill.* 301.

It follows, therefore, that the power to use the property lying outside of the boundaries of the old corporation for municipal purposes is extinct. It is admitted in the case of *Winona* v. *School District No.* 82, *supra*, that the old corporation held only the bare title to the school-house which by change of line was thrown into the city. The old corporation could only sell it as it stood. It could not use it for the purpose to which it had been built and devoted.

Now, as a matter of public policy, it is important that this kind of property shall be continuously employed in subserving the public purpose for which it was created. The only agency existing which can so use it, is that which has sprung into existence by the organization or creation of the new corporation. Now, it seems to me quite as reasonable to say that the legislature, by conferring the power to create the new corporation, implicitly conferred a power to employ all public property found within its limits, as it is to say that it meant that this property should lie idle. And if it be said that the new corporation may purchase it, it is answered, who is to fix the price? and, while negotiations are pending, who is to control and use this public property?

Now, the legislature undoubtedly, if its attention was called to this matter, would fix upon some method, judicial or otherwise, by which the distribution of municipal property and municipal debts could be adjusted in all instances like the one under consideration.

But, in the absence of such legislation, I think that the doctrine which I have announced is the most conducive to the public interest. Nor is it, as a rule, more inequitable than the other. When the property which falls within the new corporation is still to be paid for, it is, of course, inequitable that the whole burden of payment should fall upon the old corporation. But it is quite likely that such property, as I understand is the case in respect to the lateral sewers, has been

already paid for. In such case, the people in the new government have paid their proportion of the expenses, and where the property is of a kind to be distributed through the territorial limits of the old corporation, like lamp-posts, hydrants, water-pipes, and sewers, it is quite probable that the new corporation gets no more by the alteration of municipal lines than its inhabitants have paid for.

Upon the assumption, therefore, that the borough and the township are distinct corporations, I am of the opinion that the complainants have exhibited no ground for the relief they claim.

The complainants, however, insist that the parties to this suit do not stand on the footing of distinct municipalities.

The contention is that the borough, organized within the township limits, does not exclude the control of the township over all the objects of local government; that, like the city of Plainfield and the village of Flemington and certain commissions, only a portion of the local government is confided to it, while the residue remains in the larger municipality.

Now, it is undoubtedly true that the boroughs, as originally formed under the act of 1878, did not possess local powers co-extensive with those of townships. Many of the objects of local government still remained in the township; but as, by supplements to the acts of 1878, the powers of the borough government were enlarged from time to time, so, *pari passu*, those of the townships were diminished, and the township governments were necessarily excluded from any control over the subjects which were thus confided to the borough government.

This consequence necessarily results from the well-settled doctrine, that there cannot be two municipal corporations for the same purposes, with co-extensive powers of government, at the same time, over the same territory. *Grant. Corp.* 18; *Dill. Mun. Corp.* (3*d ed.*) § 184; *Paterson* v. *Society*, 4 *Zab.* 385; *King* v. *Passmore*, 3 *T. R.* 343.

Now, among the subjects which have been confided to the borough government under supplements to the general act, is that of control over sewers. *P. L. of* 1893, *pp.* 271, 460; *P. L. of* 1892, *pp.* 96, 397.

The effect of investing boroughs with this control is to exclude the control of any other municipal corporation within the limits of the borough.

It is, therefore, apparent that the discussion with respect to the constitutionality of the act of 1895, which act purported to sever the territory of the boroughs organized under the act of 1878 from the territory of the township, is unimportant, for, unless all the supplements which have conferred powers upon the boroughs are unconstitutional, the act conferring control over sewers must be regarded as valid, and it, without further legislation, excludes the township from exercising any control, in respect to this branch of municipal government, within the limits of the borough.

I therefore regard the two municipalities, in respect to the matter now under consideration, as entirely distinct. This view strips the complainants, as already remarked, of the right to relief under this bill.

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BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS *v.* CENTER TOWNSHIP AND CENTER SCHOOL TOWNSHIP.

1896. 143 *Indiana*, 391.[1]

Suit to recover possession and quiet the title in plaintiff of several parcels of real estate, and to compel the trustee of the township to convey the same to plaintiff. The parcels in question were tracts upon which school-houses had been erected for the use of the schools of Center township; and which afterwards, by an ordinance of annexation, had become embraced within the limits of the city.

Center School township claimed that, because said township was in debt for a part of the cost of such land and school-houses, the plaintiffs ought to pay a part of that indebtedness proportioned to the amount of taxable property withdrawn from the school township by the annexation. The decree, in substance, was that the trustee of the school township should convey the real estate to plaintiff, upon the payment by plaintiff to him of $4,821.48; and that plaintiff pay to the school township the said sum of $4,821.48. *Plaintiff appealed.*

C. A. Dryer, for appellant.

Ayres & Jones, for appellees.

McCabe, J. . . . The demurrer to the different paragraphs of the cross-complaint, therefore, presents the question whether the annexation of territory to a city, which territory contains a school-house and lot belonging to the school township from which the territory is taken, affords a cause of action in favor of such school township against the school corporation of such city, either for the value of such property, or for a part of any unpaid indebtedness of such school township, incurred in either the purchase of the lot or the erection of the house.

If there can be a recovery by the school township for any part of the unpaid indebtedness on account of the cost of such school building in the absence of statutory authority, then no reason is perceived why there could not be a recovery against the city school corporation for the full value of the property regardless of any indebtedness.

The question is not a new one in this court, though there is not perfect harmony in its decisions thereon.

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The whole argument of the learned counsel for appellees in support

[1] Statement abridged. Part of opinion omitted. — Ed.

of the ruling upholding the cross-complaint is based on the idea that it would be highly inequitable to allow the city school corporation to get the benefit of the taxes collected and to be collected, to defray the expense of purchasing the lots, and building the school-houses without contribution, and that the courts have power to adjust such equities by decreeing contribution against the city school corporation. But the difficulty in the way of that argument is that contribution may result in forcing the taxpayers residing in the annexed territory to pay twice, or to pay their proportion of the tax a second time.

. . . . . .

Here the Legislature has made provision that the title to school property embraced in annexed territory shall vest in and be conveyed to the school corporation of the annexing city, without making any provision for payment of any part of the value of such school-houses or any part of any indebtedness of the school township created on account thereof and remaining unpaid.

But it is insisted that in so far as the statute is retrospective it is void as to vested rights. The act is expressly retrospective, and therefore applies to the annexation involved in this case. Retrospective laws may be passed by the Legislature when they do not destroy or interfere with vested rights. *Andrews* v. *Russell*, 7 Blackf. 474; *Reed* v. *Coale, Admr.*, 4 Ind. 283; *Pritchard* v. *Spencer*, 2 Ind. 486; *Flinn* v. *Parsons, Admr.*, 60 Ind. 573; *Johnson* v. *Board, etc.*, 107 Ind. 15; *Dowell* v. *Talbot Paving Co.*, 138 Ind. 675.

The act did not interfere with vested rights, because the school township only held the title as we have seen as trustee, and the State has the right, as it did in this act, to change the trustee. Indeed, the act does nothing more than re-enact what this court had already declared the law to be in the cases we have cited in this opinion upon that point.

The question presented by the cross-complaint is the same precisely as if the trustee of Center township had promptly conveyed the school-houses and lots in question to the city school corporation, in obedience to the above mentioned act, and then sued the city school corporation for contribution as he has in the cross-complaint. The problem would be, as it now is, solved by recurring to the elementary principle that no person or corporation can be made liable to pay money outside of a tort, without a contract, express or implied, to that effect, unless such liability is created by positive law or legislative enactment. 13 Am. and Eng. Ency. of Law, 287, and authorities there cited.

There is no room for, and there is no contention that the facts establish such a contract, either express or implied, on the part of the city school corporation. Such city school corporation had nothing to do, and could have nothing to do, in bringing the annexed territory into the city, even if that would create an implied obligation to contribute. Moreover, its objections and protest against the annexation, if it had any, would have been impotent and powerless to prevent the same.

R. S. 1894, sections 3808–3809. Acts 1891, p. 137, sections 37–38. Therefore, if the city school corporation in this case is to be made liable to contribute, that liability must be created by the decree of the court, as was attempted to be done in this case. The creation of such liability being the exercise of a legislative function or power which the constitution forbids the courts to exercise, the superior court erred in attempting to do so. Section 1, article 3, Const., R. S. 1894, section 96. It follows from what we have said that the special term erred in overruling the demurrer to the several paragraphs of the cross-complaint, and consequently the general term erred in affirming that part of the judgment resting on the cross-complaint, namely, the judgment against the appellant for $4,821.48.

That part of the judgment is reversed, and the judgment in favor of the appellant, the city school corporation, for the conveyance to it of the school-houses and lots is affirmed, freed from the condition to pay said sum.

The cause is remanded, with instructions to sustain the demurrer to the several paragraphs of the so-called answer, but which is a cross-complaint or counterclaim.

SECTION II. — *Legislative Control over Municipal Property and Expenditures in Cases other than Division, Annexation, or Abolition.*

STATE EX REL. BULKELEY *v.* WILLIAMS.

1896. 68 *Conn.* 131.[1]

APPLICATION for a writ of mandamus, to enforce the payment by the Treasurer of the town of Glastonbury of an order drawn upon him by the Commissioners of the Connecticut River Bridge and Highway District, for the proportionate share required of the town, under the Act of June 28, 1895, for the maintenance of the highway under the charge of the said Commissioners.

In 1887 an Act was passed by the legislature for the purpose of making a toll-bridge across the Connecticut river a free public highway and throwing the burden of its support on the towns which would be especially benefited by such a change. Upon proceedings in the Superior Court under the above act, and after notice to the towns, it was, in 1889, judicially determined that certain towns, including Glastonbury, would be specially benefited; and that Glastonbury's proportion of the expense should be $\frac{2}{21}\frac{5}{0}$. After the toll-bridge had thus been converted into a free public highway, the legislature in 1893 enacted that the highway, which included the bridge and its ap-

[1] The statement is abridged, and some points in the case are omitted. — ED.

proaches, should thereafter be maintained by the State at its expense. Subsequently, while a new bridge was being erected at the expense of the State, the old bridge was accidentally destroyed by fire. Thereafter, on May, 24, 1895, an Act was passed repealing the Act of 1893, and requiring certain towns, including Glastonbury, to maintain in future the highway across the Connecticut river where the old bridge formerly was, with the proper approaches, and to erect a new bridge whenever necessary, and maintain the same, contributing to the expenses in the proportions established by the judgment of 1889. On June 28, 1895, an Act was passed "Creating the Connecticut River Bridge and Highway District." By this Act, Glastonbury and four other towns were constituted a corporation, under the above name, for the construction and maintenance of a free public highway across the Connecticut river at Hartford, as described in the decree of 1889. Four citizens of Hartford and one from each of the other towns were appointed commissioners for said district, with authority to maintain said free public highway; and, whenever public safety or convenience may require, to erect new bridges at the expense of said towns, at a cost not exceeding $500,000. The board was authorized to issue bonds of the district; and each of the five towns, in order to meet the principal and interest on the bonds and to pay for the ordinary support and maintenance of the highway, was required to contribute in certain proportions; the share of Glastonbury being $\frac{3}{100}$. The orders of the commissioners for the payment of money were made obligatory upon the towns, and the courts were empowered to enforce these orders by mandamus. No part of the aforesaid highway was within the town of Glastonbury.

In the Superior Court, judgment was rendered for the relators and the respondent appealed.

Lewis E. Stanton and *John R. Buck*, for respondent.[1]

Lewis Sperry and *George P. McLean*, for relators.

BALDWIN, J. . . . The judgment, brought up for review by this appeal, directed the issue of a writ of peremptory mandamus, to enforce the payment by the treasurer of the town of Glastonbury of an order drawn upon him by vote of the Commissioners for the Connecticut River Bridge and Highway District for $\frac{3}{100}$ of the sum of $500, required to meet expenses incurred by the board for the ordinary support and maintenance of the highway under their charge. In behalf of the town it is contended that it cannot thus be compelled to contribute, at the dictation of officials not of its own choosing, to the cost of maintaining a highway which is wholly outside of its territorial bounds.

It has undoubtedly been the general policy of the State to leave the expense of public improvements for highway purposes to the determination of the municipal corporations within the limits of which

[1] Arguments omitted. — ED.

the highways may be situated, and to charge them only with such obligations as may be incurred in their behalf by officers of their own selection. But when the State at large or the general public have an interest in the construction or maintenance of such works, there is nothing in our Constitution, or in the principles of natural justice upon which it rests, to prevent the General Assembly from assuming the active direction of affairs by such agents as it may see fit to appoint, and apportioning whatever expenses may be incurred among such municipalities as may be found to be especially benefited, without first stopping to ask their consent. *Norwich* v. *County Commissioners*, 13 Pick. 60; *Rochester* v. *Roberts*, 29 N. H. 360; *Philadelphia* v. *Field*, 55 Pa. St. 320; *Simon* v. *Northup*, 27 Or. 487, 40 Pac. Rep. 560. As against legislation of this character, American courts generally hold that no plea can be set up of a right of local self-government, implied in the nature of our institutions. *People* v. *Draper*, 15 N. Y. 532, 543; *People* v. *Flagg*, 46 N. Y. 401, 404; *Commonwealth* v. *Plaisted*, 148 Mass. 375, 19 Northeastern Rep. 224.

The Constitution of Connecticut was ordained, as its preamble declares, by the people of Connecticut. It contemplates the existence of towns and counties; and without these the scheme of government, which it established, could not exist. It secured to these territorial subdivisions of the State certain political privileges in perpetuity, and among others the election by each county of its own sheriff, and by each town of its own representatives in the General Assembly, and its own selectmen and such officers of local police as the laws might prescribe. It secured them, because it granted them; not because they previously existed. Towns have no inherent rights. They have always been the mere creatures of the Colony or the State, with such functions and such only as were conceded or recognized by law. *Webster* v. *Harwinton*, 32 Conn. 131. The State possesses all the powers of sovereignty, except so far as limited by the Constitution of the United States. Its executive and judicial powers are each distributed among different magistrates, elected some for counties, and some for the State at large; but its whole legislative power is vested in the General Assembly. Our Constitution imposes a few, and only a few, restrictions upon its exercise, and except for these the General Assembly, in all matters pertaining to the domain of legislation, is as free and untrammelled as the people would themselves have been, had they retained the law-making power in their own hands, or as they are in adopting such constitutional amendments from time to time as they think fit. *Pratt* v. *Allen*, 13 Conn. 119, 125; *Booth* v. *Town of Woodbury*, 32 id. 118, 126. It has not infrequently, from early Colonial days, made special provision for particular highways or bridges, and in several instances by the appointment of agencies of its own to construct or alter them at the expense of those upon whom it thought fit to cast the burden. 1 Col. Rec. 417; 5 id. 80; 13 id. 605, 630; 1 Private Laws, 282, 285.

By legislation of this nature the city of Hartford was recently compelled to contribute a large sum for a separation of grades at the Asylum street railroad crossing, and we held the Act to be not unconstitutional. *Woodruff* v. *Catlin*, 54 Conn. 277; *Woodruff* v. *New York & N. E. R. R. Co.*, 59 id. 63, 83.

That so many laws of this general description have been enacted by the General Assembly, both before and since the adoption of our Constitution, is, of itself, entitled to no small weight in determining whether they fall within the legitimate bounds of what that instrument describes as "legislative power." *Maynard* v. *Hill*, 125 U. S. 190, 204; *Wheeler's Appeal*, 45 Conn. 306.

One of those to which reference has been made (1 Priv. Laws, p. 285), required the town of Granby to build and maintain a bridge across the Farmington river, half of which was in the town of Windsor, and was adjudged to be valid by this court, notwithstanding then as now the General Statutes provided that bridges over rivers dividing towns should be built and maintained at their joint cost. *Granby* v. *Thurston*, 23 Conn. 416. There is no principle of free government or rule of natural justice which demands that the support of highways and bridges shall be imposed only on those territorial subdivisions of the State in which they are situated. If it be required of them, it is only by virtue of a statute law, which the legislature can vary or repeal at pleasure. *Chidsey* v. *Canton*, 17 Conn. 475, 478. The burden is one that the legislature can put on such public agencies as it may deem equitable, and transfer from one to another, from time to time, as it may judge best for the public interest. *Dow* v. *Wakefield*, 103 Mass. 267; *Agawam* v. *Hampden*, 130 Mass. 528; *County of Mobile* v. *Kimball*, 102 U. S. 691, 703; *Washen* v. *Bullitt County*, 110 U. S. 558.

The defendant urges that taxation and representation are indissolubly connected by the underlying principles of free government, and that this (the commission which directs the affairs of the Bridge District and makes requisitions on the towns for such funds as it deems necessary, not having been selected by them) is a sufficient defense against the payment of the order which has been drawn upon him, since it can be paid only out of moneys raised by town taxation.

Taxes can, indeed, under our system of government, only be imposed by the free consent of those who pay them, or their representatives; and for purposes which they approve. But the inhabitants of these towns were represented in the General Assembly, by which the laws now brought in question were enacted. The legislative power, after defining the general purposes of taxation, to confer upon local public corporations the right to determine the amount of the levy within the territory under their jurisdiction, is unquestionable; and in its exercise it is immaterial whether the corporations, to which that function is entrusted, or between which it is shared, be called counties or towns, school districts or bridge districts. When a levy is voted, the action

is corporate action, deriving its obligatory force wholly from the authority of the State. Towns cannot tax their inhabitants for any purpose except by virtue of statute law. That law for many years required them annually to tax for moneys to be paid over to the State treasurer for State expenditures. It now requires them to tax, as occasion may require, for moneys to be paid over to the county treasurer for county expenditures. It can equally require any town or towns to tax for moneys to be paid over to the treasurer of a bridge or highway district, in which they are included, for district expenditures. *Kingman et al., Petitioners*, 153 Mass., 566, 27 Northeastern Rep. 778.

It has been suggested that in Colonial times it was the right of the inhabitants of every town, themselves, to order the municipal duties assigned to them and choose the officers by whom only it could be placed under a pecuniary obligation, and that this is one of those rights and privileges "derived from our ancestors," to "define, secure and perpetuate" which our Constitution was adopted, and to which its preamble refers. If it can be said that such a right ever existed, it was not one of the nature of those which were described by the framers of the Constitution. They were speaking of rights personal to the individual, as a citizen of a free commonwealth; civil as distinguished from political; and belonging alike to each man, woman and child among the people of Connecticut. Such of them as they deemed most essential they proceeded to specify in the Declaration of Rights, and here we find asserted (Art. 1, § 2) that "all political power is inherent in the people, and all free governments are founded on their authority" and subject to such alterations in form, from time to time, "as they may think expedient." If there were any absolute right in the inhabitants of our towns to regulate their town finances and affairs which was superior to all legislative control, it would be a great "political power." It would create an *imperium in imperio*, and invest a certain class of our people — those qualified to vote in town meetings — with the prerogative of defeating local improvements which the General Assembly deemed it necessary to construct at the expense of those most benefited by them, under the direction of agents of the State, unless the work were done and its cost determined under town control. No set of men can lay claim to such a privilege under the Constitution of Connecticut.

. . . . . .

Nor is it of any importance that in 1893 the State had taken the maintenance of the bridge upon itself. This was merely a gratuitous act, with no element of a contract, and gave rise to no vested rights, except such as might accrue from obligations on the part of the State subsequently assumed by virtue of its provisions.

. . . . . .

The defendant also urges that the Act of June 28th violates the XIVth Amendment of the Constitution of the United States, in that it

deprives the town of Glastonbury of property without due process of law, and denies to it the equal protection of the laws. No right, as against a State, to the equal protection of the laws is secured to its municipal corporations by this amendment, which can limit in any way legislation to charge them with public obligations. Nor have their inhabitants, in their capacity of members of such corporations, any greater rights or immunities. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 93. No property of the town of Glastonbury has been or is to be taken. *Booth* v. *Town of Woodbury*, 32 Conn. 118, 130; *Railroad Company* v. *County of Otoe*, 16 Wall. 667, 676. A duty to lay taxes for public purposes has been imposed, and for reasons already stated, it was competent to the General Assembly to create that duty, as it was created. Their proceedings were due proceedings: the process by which it is now sought to compel the defendant to pay the sum in controversy is due process. The town can found no claim, under the Constitution of the United States, any more than under that of Connecticut, to such right of local self-government as precludes the General Assembly from exacting this payment, notwithstanding the demand comes from another municipal corporation, the Bridge District, in choosing whose members, or directing whose affairs, it has had no share. *Giozza* v. *Tiernan*, 148 U. S. 657, 662.

We have spoken of the Bridge District as a municipal corporation, although it may not answer the common law definition of that term, since not composed of the inhabitants of any territory as such. In modern times corporations, both public and private, have often been constituted by a union of other corporations. Such was the United States of America after the Declaration of Independence, and until the adoption of their present Constitution. Such are the various counties of this State, once *quasi* corporations and now full corporations, the constituents of which have always been the several towns within their boundaries. The power of the Bridge District over the towns composing it is no less than it would have been, had their inhabitants individually been made its members. The district and the towns are alike agencies of the State for governmental purposes and, whether they be styled public or municipal corporations, their relations to it and to each other are the same, and equally subject to modification at its pleasure.

The defendant having refused to pay an order lawfully drawn upon him in behalf of the Bridge District, the writ was properly issued against him.

TORRANCE, J., and FENN, J., concurred.

ANDREWS, C. J., delivered a dissenting opinion (68 Conn. p. 157 to p. 177), in which HAMERSLEY, J., concurred.

PEOPLE EX REL. LE ROY *v.* HURLBUT ET AL.

1871. 24 *Michigan*, 44.[1]

INFORMATIONS in the nature of *quo warranto*.

These proceedings are brought to test the right of the members of the boards of water commissioners, and of sewer commissioners of the city of Detroit, to continue to hold their respective offices after the taking effect of the act establishing a board of public works; and the questions raised relate to the validity of said act.

The act[2] transfers to the board of public works all the powers, duties, and responsibilities of the old board of water commissioners, the board of sewer commissioners, and of the commissioners of grades and plans. It gives the board charge and control of the construction of all public buildings except school-houses, public sewers, drains, and water-works. It authorizes the board to take proceedings to condemn property by the right of eminent domain; to contract for the performance of the various works confided to their charge, to employ workmen, to draw upon the proper funds for payment of expenses, and to issue bonds in certain cases to obtain means for carrying on any of said works.

The first members of the board are appointed by the legislature, and in the act itself. They are four in number, and are to hold by classified terms of two, four, six, and eight years. All vacancies, whether by expiration of term of service or otherwise, shall be filled by the common council of the city; and no person shall be eligible for said board who is not a freeholder in said city and a qualified elector.

J. P. Whittemore, *Lyman Cochrane*, *E. W. Meddaugh*, and *Theodore Romeyn*, for respondent.

Samuel T. Douglass, *Geo. V. N. Lothrop*, and *J. Logan Chipman*, for relators.

COOLEY, J. [After discussing other points.] We have before us a legislative act creating for the city of Detroit a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to have general charge of the city buildings, property and local conveniences, to make contracts for public works on behalf of the city, and to do many things of a legislative character which generally the common council of cities alone is authorized to do. The legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive government of the city, and the appointment of all its officers, excepting only the judicial,

[1] Three opinions omitted; also the arguments. — ED.

[2] This statement of the provisions of the act is abridged from the opinion of CHRISTIANCY, J., 24 Mich. p. 55–58, and p. 74. — ED.

for which, by the constitution, other provision is expressly made. And the question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.

Now, it must be conceded that the judicial decisions and law writers generally assert that the state creates the municipal bodies, endows them with such of the functions of corporate life and entrusts them with such share in the local government, as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short that the corporate entities are mere agencies which the state employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent. This I understand to be the accepted theory of state constitutional law as regards the municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in any thing more than a general sense; they never are and never can be literally accepted in practice.

Our constitution assumes the existence of counties and townships, and evidently contemplates that the state shall continue to be subdivided as it has hitherto been; but it nowhere expressly provides that every portion of the state shall have county or township organizations. It names certain officers which are to be chosen for these subdivisions, and confers upon the people the right to choose them; but it does not in general define their duties, nor in terms preclude the legislature from establishing new offices, and giving to the incumbents the general management of municipal affairs. If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the state might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupilage and dependence to any extent, and for any period of time the state might choose.

The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be

somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general frame-work of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

The circumstances from which these implications arise are: *First*, that the constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, *second*, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system.

DeTocqueville speaks of our system of local government as *the American system*, and contrasts it forcibly with the French idea of centralization, under the influence of which constitutional freedom has hitherto proved impossible. — *Democracy in America, chapter* 5. Lieber makes the same comparison, and shows that a centralized government, though by representatives freely chosen, must be despotic, as any other form of centralization necessarily is. "Self-government," he says, "means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality." — *Civil Liberty and Self-Government*, *chap.* 21. The writer first named, speaking of the New England township government, whose system we have followed in the main, says: "In this

part of the union the impulsion of political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the state. The townships of New England remained as they were before; and, although they are now subject to the state, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem, on the contrary, to have surrendered a portion of their independence to the state. The townships are only subordinate to the states in those interests which I shall term *social*, as they are common to all the citizens. They are independent in all that concerns themselves; and among the inhabitants of New England, I believe that not a man is to be found who would acknowledge that the state has any right to interfere in their local interests." — *Democracy in America*, *ubi supra*. Now, if this author is here speaking of the theory of our institutions, he is in error. It is not the accepted theory that the states have received delegations of power from independent towns; but the theory is, on the other hand, that the state governments precede the local, create the latter at discretion, and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that local governments universally, in this country, were either simultaneous with, or preceded, the more central authority. In Massachusetts, originally a democracy, the two may be said to have been at first identical; but when the colony became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs. —*Hutchinson's Massachusetts Bay, ch.* 1; *Washburn's Jud. Hist. of Mass. ch.* 1; *Body of Liberties*, §§ 62, 66, 72; *Elliot's New England, Vol.* 4, *pp.* 425, 427.

But in Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time. — *Trumbull's Hist. of Conn., Vol.* 1, *pp.* 132, 498; *Palfrey's New England, Vol.* 1, *p.* 454. What the colony did was only to confer charters, under which the town authority would be administered within agreed limits, and possibly, with more regularity than before. In Rhode Island, it is also true, that township organization was first in order of time. — *Arnold's Hist., of R. I., ch.* 7. This author justly remarks, that when the charter of Rhode Island was suspended to bring her under the dominion of Andros, "*the American system of town governments*, which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the liberty of the individual citizen when that of the state, or colony, was crushed." — *Vol.* 1, *p.* 487. So in Vermont, the people not only, for a time, conducted

all their public affairs in towns and plantations, through committees, officers and leaders, nominally appointed and submitted to by general consent and approbation, but they carried on their controversy with New York for some years, without any other organization. — *Williams' Hist. of Vermont, Vol.* 2, *p.* 163. In New Jersey, as in Massachusetts, towns were chartered in connection with grants of land, and in some instances, those which were made by Nichols, adverse to the proprietary, were suffered to remain after his authority was superseded. — See instances in *Mulford's Hist. of N. J. pp.* 143–4. The charter to Lord Baltimore plainly recognized local government in the provision requiring the laws and ordinances established to conform to the laws, statutes or rights of England. — *Bozman's Hist. of Maryland, p.* 290. And county authorities seem to have existed from the very first, though their statutory organization, if any they had, cannot be traced. — *Bozman, pp.* 299–303. But it cannot be necessary to particularize further. The general fact was, that whether the colonial or local authority should originate first, depended entirely upon circumstances which might make the one or the other the more immediate need. But when both were once established they ran parallel to each other, as they were meant to do, for all time; and what Mr. Arnold says of Rhode Island, may be said generally of the eastern and middle states, that the attempt of the last two Stuarts to overthrow their liberties, was defeated by means of the local organizations. The scheme tried first in England, to take away the corporate charters in order to make the corporators more dependent on the crown, and to restrain them from political action in opposition to the court party, found, in America, the colonial charters alone within the reach of arbitrary power; and though these were taken away or suspended, it was only with such protest and resistance as saved to the people the town governments. In Massachusetts, it was even insisted by the people's deputies that, to surrender local government was contrary to the sixth commandment, for, said they, "men may not destroy their political, any more than their natural lives." So, it is recorded they clung to "the civil liberties of New England" as "part of the inheritance of their fathers." — *Palfrey's New England, Vol.* 3. *pp.* 381–383; *Bancroft's U. S., Vol.* 2, *pp.* 125–127; *Mass. Hist. Col., XXI,* 74–81. The whole contest with Andros, as well as in New England, as in New York and New Jersey, was a struggle of the people in defense of the right of local government. "Everywhere," says Dunlap, "the people struggled for their rights and deserved to be free." — *Hist. of N. Y., Vol.* 1, *p.* 133; and see *Trumbull's Hist. of Conn., Vol.* 1, *ch.* 15.

I have confined this examination to the states which have influenced our own polity most; but the same principle was recognized and acted on elsewhere. The local governments, however, were less complete in the states further south, and this, with some of their leading statesmen, was a source of regret. Mr. Jefferson, writing to Governor Tyler

in 1810, speaks of the two great measures which he has at heart, one of which is the division of counties into hundreds. "These little republics," he says, "would be the main strength of the great one. We owe to them the vigor given to our revolution, in its commencement, in the eastern states. . . . Could I once see this, I should consider it as the dawn of the salvation of the republic." — *Jefferson's Works, Vol.* 5, *p.* 525. Mr. Jefferson understood thoroughly the truth, so quaintly expressed by Bacon, when he said of a burden imposed as compared to one freely assumed, that "it may be all one to the purse, but it worketh diversely upon the courage."

Such are the historical facts regarding local government in America. Our traditions, practice and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a state power, have been purely exceptional. The most prominent of these was the case of the mayor of New York, who continued, for a long time after the revolution, the appointee of the governor. But this mode of choice originated when the city was the seat of colonial government, and while it constituted a large part of the colony, and the office was afterwards of such dignity and importance, and was vested with so many general powers, that one of the first statesmen of the nation did not hesitate to resign a seat in the senate of the United States to accept it. — *Hammond's Pol. Hist. of N. Y., Vol.* 1, *p.* 197. Moreover, the first constitution of New York was, in important particulars, exceptional. That state had at the time a powerful aristocratic element, by which its first institutions were in a great measure shaped; and a distrust of popular authority was manifest. It is scarcely needful to say that features of that character disappeared when the constitution was revised.

For those classes of officers whose duties are general, — such as the judges, the officers of militia, the superintendents of police, of quarantine, and of ports, by whatever name called, — provision has, to a greater or less extent, been made by state appointment. But these are more properly state than local officers; they perform duties for the state in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general. In the case before us, the officers in question involve the custody, care, management, and control of the pavements, sewers, water-works and public buildings of the city, and the duties are purely local. The state at large may have an indirect interest in an intelligent, honest, upright and prompt discharge of them; but this is on commercial and neighborhood grounds rather than political, and is not much greater or more direct than if the state line excluded the city. Conceding to the state the authority to shape the municipal organiza-

tions at its will, it would not follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to me the best authorities, as well as the soundest reason. The municipality, as an agent of government, is one thing; the corporation, as an owner of property is in some particulars to be regarded in a very different light. The supreme court of the United States held at an early day that grants of property to public corporations could not be resumed by the sovereignty. — *Terrett* v. *Taylor*, 9 *Cranch*, 43; *Town of Pawlet* v. *Clark*, *ibid.*, 292; and see *Dartmouth College* v. *Woodward*, 4 *Wheat.*, 694–698. When the state deals with a municipal corporation on the footing of contract, it is said by Trumbull, J., in *Richland* v. *Lawrence*, 12 *Ill.*, 8, the municipality is to be regarded as a private company. In *Detroit* v. *Corey*, 9 *Mich.*, 195, Manning, J., bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the state at large had no concern. In *Warren* v. *Lyons*, 22 *Iowa*, 351, it was held incompetent for the legislature to devote to other public uses land which had been dedicated for a public square. In *State* v. *Haben*, 22 *Wis.*, 660, an act appropriating moneys collected for a primary school to the erection of a state normal school building in the same city was held void. Other cases might be cited, but it seems not to be needful. They rest upon the well understood fact that these corporations are of a two-fold character; the one public as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; and that as to the acquisitions they may make in the latter capacity as mere corporations, it is neither just, nor is it competent, for the legislature to take them away, or to deprive the local community of the benefit thereof. There may come a time when from necessity the state must interpose. The state may change municipal boundaries; and then a division of the corporate property may be needful. The state may take away the corporate powers, and then the property must come to the state as trustee for the parties concerned. In either of these cases, undoubtedly, state action becomes essential; and the property may be disposed of according to the legislative judgment and sense of justice; but even then the appropriation must have regard, so far as the circumstances of the case will admit, to the purposes for which the property was acquired, and the interest of those who were corporators when the necessity for state intervention arose.

In view of these historical facts, and of these general principles, the question recurs whether our state constitution can be so construed

as to confer upon the legislature the power to appoint for the municipalities, the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. As the legislature could not be compelled to regard the local political sentiment in their choice, and would, in fact, be most likely to interfere when that sentiment was adverse to their own, the government of cities might be taken to itself by the party for the time being in power, and municipal governments might easily and naturally become the spoils of party, as state and national offices unfortunately are now. All these things are not only possible, but entirely within the range of probability, if the positions assumed on behalf of the state are tenable. It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom; but what is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the constitution the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. If this charter of state government which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought,

methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so, — if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give, — this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.

Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely guarantied, assured and guarded; in one's liberties as a man and a citizen, — his right to vote, his right to hold office, his right to worship God according to the dictates of his own conscience, his equality with all others who are his fellow-citizens; all these guarded and protected, and not held at the mercy and discretion of any one man or of any popular majority. — *Story, Miscellaneous Writings*, 620. If these are not now the absolute right of the people of Michigan, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it. The men who framed our institutions have not so understood the facts. With them it has been an axiom, that our system was one of checks and balances; that each department of the government was a check upon the others, and each grade of government upon the rest; and they have never questioned or doubted that the corporators in each municipality were exercising their franchises under the protection of certain fundamental principles which no power in the state could override or disregard. The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

What I say here is with the utmost respect and deference to the legislative department; even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our

structure of liberty should be warded off. Nevertheless, when the state reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established.

But I think that, so far as is important to a decision of the case before us, there is an express recognition of the right of local authority by the constitution. That instrument provides (*Art. XV.*, § 14) that "judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed, at such time and in such manner as the legislature may direct." It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be, that in examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, and not by the legislature, or by the people of a larger territory than that immediately concerned. I think also that when the constitution is examined in the light of previous and contemporaneous history, the like general intent requires, in language equally clear and imperative, that the choice of the other corporate officers, shall be made in some form, either directly or indirectly, by the corporators themselves.

The previous history I have sufficiently referred to; and it is a part of the public history of the times that the convention which framed the constitution of 1850 had in view as prominent objects, to confide more power to the people, to make officers generally elective, and to take patronage from the executive. We see this in the provisions for the elections of judges, state officers, regents of the university and prosecuting attorneys; in the requirement that banking laws shall be referred to the people for adoption; in the exclusive control given to the supervisors in the settlement of claims against counties, and in the express provision that "the legislature may confer upon organized townships, incorporated cities and villages, and upon the boards of supervisors of the several counties, such powers of a local, legislative and administrative character as they may deem proper." All these were in the direction of popularizing authority. Even the officers who were to perform the duties of master in chancery were required to be elected. When, therefore, we seek to gather the meaning of the constitution from "the four corners of the instrument," it is impossible

to conclude that the appointments here prescribed, in immediate connection with elections by the local voters, and by a convention intent on localizing and popularizing authority, were meant to be made at the discretion of the central authority, in accordance with an usage not prevalent since the days of the Stuarts, and which even then was regarded, both in England and America, as antagonistic to liberty and subversive of corporate rights.

So far, then, as the act in question undertakes to fill the new offices with permanent appointees, it cannot be sustained, either on general principles, or on the words of the constitution.

[The learned Judge then discussed the question whether the legislature might make provisional appointments to put the new system in operation, and whether the first members named in the act would rightfully hold office as provisional incumbents until appointees were named by the common council. He answered these questions in the affirmative, and held that the persons named in the act were entitled to the office as provisional appointees.

CAMPBELL, C. J., CHRISTIANCY, J., and GRAVES, J., also delivered opinions. They all concurred in the view that the legislature could not appoint members of the board of public works as permanent officers for the full term. On the question whether the legislative appointments could be sustained as a provisional measure, CHRISTIANCY, J., concurred with COOLEY, J., in holding the affirmative. CAMPBELL, C. J., and GRAVES, J., held *contra.*]

STATE OF WISCONSIN, EX REL. BOARD OF EDUCATION OF THE CITY OF OSHKOSH *v.* HABEN.

1868. 22 *Wisconsin*, 660.[1]

APPEAL from the Circuit Court.

Alternative *mandamus* to require the city treasurer of Oshkosh to pay orders drawn by the board of education in favor of Alger, a contractor on the high school building. By an act passed in 1866, the board were authorized to raise, by special tax, money for the erection of a high school building; and were also authorized, if in their judgment it was necessary, to appropriate the money so raised to the purpose of establishing a state normal school in said city. The said act further empowered the board to raise, by special tax, money for the establishment of a state normal school. Under a resolution of the board, money was raised by taxation for a high school building, and was paid over to the city treasurer. The board did not set apart any of this money for a normal school, nor did they raise any money by taxation for a normal school. In 1867, an act was passed providing,

[1] Statement abridged. Arguments omitted. — ED.

in substance, that $10,000 of the money raised by the said tax in 1866 shall be retained in the city treasury, and that the purchase money for the site selected for a normal school in said city shall be paid out of said $10,000 when the title of said site shall be approved by the regents of the normal schools.

Motion to quash the writ of *mandamus*. Motion denied. Defendant appealed.

Jackson & Halsey, for appellant.

Freeman & Hancock, for relators.

DIXON, C. J. This case presents two questions, which may be stated thus: 1. Was the defendant justified in refusing payment of the orders set forth in the alternative writ? 2. If he was not, are the relators the proper parties to apply to the court for a writ of *mandamus* to compel him to pay them?

The answer to the first question depends on the validity of so much of section 1, chap. 348, Private and Local Laws of 1867, as sets apart and retains in the treasury of the city of Oshkosh, or attempts so to do, the sum of ten thousand dollars out of the tax levied in the year 1866 under the authority conferred by chapter 236, Private and Local Laws of 1866, entitled "An act to authorize the board of education of the city of Oshkosh to levy a tax to build a school-house," which said sum of ten thousand dollars, so to be set apart and retained, was to be paid out as the purchase money for the site for a normal school in said city, to be selected and the title approved and accepted by the board of regents of normal schools. The tax levied in the year 1866, of which this sum of ten thousand dollars was a portion, was, in the words of the act by which it was authorized, levied "to be used for the purpose of erecting a suitable high school building in said city." It was lawfully so levied. It is true that the board of education of the city of Oshkosh, under whose direction the levy was made, were authorized to raise a portion of the sum or sums specified in the 6th section of the act "for the purpose of aiding in the establishment of a state normal school in said city." This authority was, however, purely discretionary; and as the board of education saw fit not to raise any money for that purpose, the inquiry is the same as if no such authority had been conferred. The question then is: Was it competent for the legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing the site for a state normal school in the city? We are clearly of opinion that it was not. It is well settled as to all matters pertaining to vested rights of property, whether real or personal, and to the obligation of contracts, that municipal corporations are as much within the protection of the federal constitution as private individuals are. The legislature cannot divest a municipal corporation of its property, without the consent of

its inhabitants, nor impair the obligation of a contract entered into with or in behalf of such corporation. See *Milwaukee* v. *Milwaukee*, 12 Wis., 93, and authorities cited. What was the act in question but a most obvious attempt, at the mere will of the legislature, to deprive the city of Oshkosh of so much money lawfully acquired for a proper municipal purpose, and, without the assent of the inhabitants, to apply it to another purpose, not municipal, but one in which all the people of the state have a common interest? Clearly no other effect can be given to it. A state normal school, as its name indicates, is a state institution established for the benefit of the people of the entire state and maintained by funds provided by the state. This will readily appear from an examination of the several statutes under which those schools are organized, and which prescribe the powers and duties of the board of regents of the same. R. S. ch. 22; Laws of 1859, ch. 94; Laws of 1865, ch. 537; Laws of 1866, ch. 116. The regents are appointed by the governor by and with the approval of the senate, and the title of the lands, buildings, furniture, books, apparatus and all other property and effects, is vested in the board, which has the exclusive management and control of the same. To say, therefore, that the legislature can, without the assent of the proper municipal authorities or of the inhabitants, take the money of the city of Oshkosh and appropriate it to the establishment of a state normal school, is to say that it can take the money of any municipal corporation and apply it to any general state purpose. If the act had directed the money in question to be deposited in the state treasury as part of the general fund belonging to the state. or had appropriated it toward the completion of the state capital now in process of construction, the violent nature of the proceeding might have been more manifest, but it would not have been more unauthorized. The advantages incidentally accruing to the citizens of Oshkosh from the establishment of a state normal school at that place, though sufficient, with the consent of the legislature, to justify the citizens themselves, or the proper municipal officers, in levying a tax to aid in the purchase of a site or the erection of buildings, do not change the nature of the question here presented. The tax so levied must be with the assent of the citizens or proper city officers. The legislature has no power arbitrarily to impose such a tax, as that would not only be in plain conflict with the rule of uniformity in taxation prescribed by the constitution, but contrary to the general principles of law governing such proceedings. If, therefore, the legislature cannot impose a tax for such a purpose, it follows that it cannot for the same purpose arbitrarily appropriate the money of the city already lawfully raised by taxation for another. As well might the legislature, without the assent of the city, appropriate the high school building itself, after its completion, for a state normal school, as seize the funds provided by the city for the purpose of erecting it. This, we think, would be regarded by every one as wholly unjustified by any sound principle of

legislation — a mere act of lawless violence. The act in question, though the injustice of it may not be quite so apparent, in reality stands on no better foundation.

2. Are the relators the proper parties to apply for this writ? We think not.

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[On the latter ground the order below was reversed.]

DARLINGTON *v.* MAYOR &c. OF NEW YORK.

1865. 31 *New York*, 164.[1]

Suit, in the Superior Court, under the statute of April 13, 1855 (Chapter 428), which provides that, whenever any property shall be destroyed or injured in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action by the owner for the damages so sustained. The statute further provides that, whenever any final judgment shall be recovered against any such city or county, the treasurer of said city or county shall, upon the production of a certified copy of the judgment roll, pay the amount of such judgment, and charge the amount thus paid to said city or county.

On the trial, defendants admitted the destruction of plaintiff's personal property, by a riotous assemblage, on July 13, 1863.

Defendants moved for a nonsuit; one ground of the motion being, that the effect of the statute was to deprive the defendants of their property without due process of law. The court nonsuited the plaintiff. The General Term made an order reversing the judgment of nonsuit and directing a new trial. From this order, the defendants appealed.

John K. Hackett and *Wm. Fullerton*, for defendants.

Thomas Darlington, plaintiff, in person.

Cephas Brainerd and *James S. Stearns*, of counsel for nine hundred and fifty plaintiffs in like cases.

Denio, C. J. [After deciding another point.] The other objection is that by force of the act, if it shall be executed, what is termed the private property of the city may be taken for a public use without due process of law, and without a provision for compensation. It cannot be doubted but that the general purposes of the law are within the scope of legislative authority. The legislature have plenary power in respect to all subjects of civil government, which they are not prohibited from exercising by the Constitution of the United States, or by some provision or arrangement of the Constitution of this State. This act proposes to subject the people of the several local divisions of the State, consisting of counties and cities, to the payment of any damages to property in consequence of any riot or mob within the county or city.

[1] Statement rewritten. Arguments omitted; also the dissenting opinion of Ingraham, J., and portions of the opinion of Denio, C. J. — Ed.

The policy on which the act is framed, may be supposed to be, to make good, at the public expense, the losses of those who may be so unfortunate, as without their own fault to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent; and further, and principally we may suppose, to make it the interest of every person liable to contribute to the public expenses to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to attain them that governments are instituted; and the means provided by this act seem to be reasonably adapted to the purposes in view. If this were less obvious, the practice of the country from which we derive so many of our legal institutions would leave no doubt on the subject. Laws of this general character have existed in England from the earliest period. It was one of the institutions of Canute the Dane, which was recognized by the Saxon laws, that when any person was killed, and the slayer had escaped, the ville should pay forty marks for his death; and if it could not be raised in the ville, then the hundred should pay it. "This irregular provision," says an able author, "it was thought would engage every one in the prevention and prosecution of such secret offenses." (1 Reeve's History of Eng. Law, 17.) Coming down to the reign of the Norman kings, we find in the statute of Winchester (13th ed., I, ch. 1, p. 1) a provision touching the crimes of robbery, murder and arson — that if the country, *i. e.*, the jury, would not answer for the bodies of the offenders, the people dwelling in the county were to be answerable for the robberies, and the damages sustained, so that the whole hundred where the robbery was committed, with the franchises thereof, should be answerable. It is upon this statute that the action against the hundred, for robberies committed therein, of which so many notices are met with in the old books, is grounded. (Reeve, vol. I, p. 213; Second Ins., ch. 17, p. 569.)

Passing by the statutes of subsequent reigns, and particularly several in that of Elizabeth, in which this remedy has been somewhat modified while its principle is steadily adhered to, we come to the 7th and 8th Geo. IV, ch. 31, which was an act for consolidating and amending the laws of England, relative to remedies against the hundred. It repeals several prior acts providing remedies against the hundred for the damages occasioned by persons violently and tumultuously assembled, and enacts a series of provisions very similar in effect with, and in some respects more extensive in their scope than those of the statute under consideration. As the hundreds were not corporations, the action was to be brought against the high constable; and on judgment being rendered, the sheriff was to draw his warrant on the county treasurer for the amount of the recovery. Ultimately, the money was to be collected by local taxation in the hundred made liable. These provisions have no direct bearing upon the present case, but are re-

ferred to to show that the action in question is based upon a policy which is coeval with the laws of England, and one which has been constantly acted on in that country, and hence that it very clearly falls within the general powers of the legislature.

As, however, the objection of the defendants arises out of a constitutional restraint, substantially identical with one of the provisions of *Magna Charta* (ch. 29), it is at least a curious coincidence, that the policy of compelling a local community to answer with their property for acts of violence committed by others, has been considered by the English parliament as a supplement to, rather than a violation of, the Great Charter.

In the statute called *Articuli super cartam*, Anno 28 Edward I, which confirmed the Great Charter and the Charter of the Forest, and directed that the same should be firmly observed "in every part and article," it was directed in terms that the statute of Winchester, which gave a remedy against the hundred, for robberies committed in it, should be sent again into every county to be read and published four times a year, and kept in "every point as strictly as the two Great Charters, upon the pains therein limited." (Reeve, vol. II, p. 340; Coke, 2 Inst., ch. 17, p. 369.)

Assuming it to be sufficiently apparent that the statute in question falls within the general scope of legislative authority, the particular inquiry is, whether it violates the constitutional provisions relied on by the defendant. It is plain enough that the suits which it authorizes, will, if successful, result in requiring contributions from the tax-payers of the local communities, to make good the losses of persons who have suffered from the acts of rioters. In that way, it may be said that their property may be taken. In one sense it may be conceded that it is taken for a public use; for when the State undertakes to indemnify the sufferers from riots, the executing of that duty is a public concern, and the expenditure is on public account. It is a public use in the same sense as the expenditure of money for the erection of court houses and jails, the construction of roads and bridges, and the support of the poor. It is taken for an object which the legislature has determined to be of public importance, and for the interest of the State. Private property thus taken is not seized by the execution of the right of eminent domain.

If it were so considered, all contributions exacted from citizens for defraying the expenses of the government and of local administration, would, in order to be legal, require the return of a precise equivalent to the tax payers as a compensation, which would be absurd. Every one will at once see that this cannot be so, and that if it were, government could not be carried on at all. But no general reasoning is necessary, for the subject has been elaborately considered and determined in this court.

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There can be no objection to imposing the burthens which shall

arise in the execution of the act, upon the local division where the riots take place, and the losses were occasioned. This is the case with all public exactions, which from their nature are local in their objects, and which generally arrange themselves under the head of town, city or county charges. If we look at the statute we are examining, as resulting ultimately in occasioning taxation, for the means of raising the money which will be required to carry out its purposes, the foregoing observations will be all which it seems to me necessary for the determination of this appeal; and I am of opinion that it should be considered in that light.

But it is contended that the application of the case to the city of New York, raises a further and different question. The fact that it is governed by a corporation, under a charter conferring certain municipal rights, does not, of course, raise any distinction. The authority of the legislature prevails within the limits of chartered cities and villages, and the public laws have the same force there as in the other parts of the State. That position does not admit of an argument. (*The People* v. *Morris*, 13 Wend., 325.)

The particular point appears to be that the form of the remedy for raising the money required to pay individual losses, provided by the act, leads to consequences which would violate the constitutional provision. The party who has sustained damages by a riot, may prosecute the city corporation; and the act provides that if he obtain judgment, the city treasurer is to pay the amount and charge it to the city. It is argued that it may happen that there will be no moneys in the treasury, or the treasurer may be unable or unwilling to make the payment; but the plaintiff, having a judgment against the corporation, may cause an execution to be levied upon its property. The property of the city, it is further argued, is private property, which the corporation holds by the same title as an individual or a private corporation, and that it is equally under the protection of the Constitution. The effect of the act, as it is urged, therefore, is the same as though the property of one designated private citizen should be directed to be seized and appropriated to pay a local public charge. This, it is plain, could not be justified under the taxing power or any other head of legislative authority. The answer made to this argument, in the printed opinion of the Superior Court, is, that the method of collecting the judgment by application to the treasurer, is exclusive, and that property cannot be taken on execution upon such judgments. This answer is not entirely satisfactory to my mind. By permitting the party who had sustained damages to recover judgment in the ordinary course of justice, without any provision qualifying the effect of such judgment, it cannot, I think, have been intended to withhold from him any of the legal rights of a judgment creditor. The most universal of these rights is that of levying the amount of the judgment against the property of the debtor, by the usual process of execution. If it were intended to exclude that remedy, it is difficult to see why a judgment should be per-

mitted to be recovered at all. Without that effect the judgment would be illusory in many cases, for it would rarely, if ever, happen that there would be funds in the treasury adequate and applicable to the payment of such damages where they should be for a considerable amount. My opinion is, that the judgment is of the same force and efficacy as any other judgment which may be rendered against the city, subject, perhaps, to the duty of first presenting it to the treasurer.

It is plain enough that it would not be a judicious administration of the affairs of a city to permit its property to be subjected to a forced sale on execution; and hence it has become a usual practice to add to the sums included in the annual tax levy any amount for which judgments have been recovered against the corporation, and to authorize the borrowing of money, if necessary, in order to pay such judgments. Instances of such legislation occur in many of the recent statutes. (Laws of 1863, p. 411, § 6; id., 1864, p. 938, § 1, p. 946, § 5.) A municipal corporation, equally with a private corporation, may have its property taken in execution, if payment of a judgment is not otherwise made. I am far from supposing, however, that such estate, real or personal, as may by law, or by authorized acts of the city government, be devoted to public use, such as the public edifices, or their furniture or ornaments, or the public parks or grounds, or such as may be legally pledged for the payment of its debt, can be seized to satisfy a judgment. Such, clearly, cannot be the case, for these structures are public property, devoted to specific public uses, in the same sense as similar subjects in the use of the State government. The argument that I am examining supposes that the city may possess other property, held for purposes of income or for sale, and unconnected with any use for the purposes of the municipal government. Such property, the defendants' counsel insists, and for the purpose of the argument I concede, is subject to be levied on and sold to satisfy a judgment rendered against the city corporation. The true answer to the position that such seizure would be a violation of the constitutional protection of private property is, that it is not private within the sense of that provision. City corporations are emanations of the supreme law making power of the State, and they are established for the more convenient government of the people within their limits. In this respect, corporations chartered by the crown of England, and confirmed at the revolution, stand on the same footing with similar corporations created by the legislature. Their boards of aldermen and councilmen and other officers are as truly public officers as the boards of supervisors, or the sheriffs and clerks of counties; and the property intrusted to their care and management is as essentially public property as that confided to the administration of similar official agencies in counties and towns. In cities, for reasons partly technical, and in part founded upon motives of convenience, the title is vested in the corporate body. It is not thereby shielded from the control of the legislature, as the supreme law making power of the State. Let us suppose the city to be the owner

of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes, or the like. No one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds to be devoted to some municipal or other public purpose, within the city, as a court house, a hospital, or the like; and yet, if the argument on behalf of the defendants is sound, it would be the taking of private property for public use without compensation, and the act would be void.

What has been actually done respecting such city property, in the present case, if a judgment for riot damages has the effect which the argument supposes, and which I attribute to it, is to render it liable to sale on execution, to satisfy a liability of the city arising under the riot act; and this has been done under the express authority of the legislature. The vice of the argument of the defendant is, that it assimilates the condition of the city, in respect to the property to which it has title, to that of an individual or a private corporation, and denies to the legislature any power over it which it would not possess over the fortunes of a private citizen.

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In respect to its powers, the corporate body is understood to be the trustees of the people represented by the supreme legislative power of the State, but in regard to its property it is argued that there are no beneficiaries. The property, it is insisted, is private, and hence the legislature has no legitimate control over it.

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But in what sense can this city property be said to be private? It certainly does not belong to the mayor or any or all of the members of the common council, nor to the common people as individual property. (*Roosevelt* v. *Draper*, 23 N. Y., 318.) If one of these functionaries should appropriate it or its avails to his own use, it would be the crime of embezzlement, and if one of the people not clothed with official station should do the like, it would be the offense of larceny. Should it be said that like all corporate property, it belongs to the ideal being, the corporation, and that its title is beneficial and not fiduciary, that answer would not avoid the difficulty. Indeed it would not be sound. A corporation, as such, has no human wants to be supplied. It cannot eat or drink, or wear clothing, or live in houses. It is the representative or trustee of somebody, or of some aggregation of persons. We cannot conceive the idea of an aggregate corporation which does not hold its property and franchise for some use, public or private. The corporation of Dartmouth College was held to be the trustee of the donors, or of the youth needing education and moral and intellectual training. The corporation of New York, in my opinion, is the trustee of the inhabitants of that city. The property, in a general and substantial, although not a technical sense, is held in trust for them. They are the people of this State — inhabiting that particular subdivision of its territory — a fluctuating class constantly passing out

of the scope of the trust by removal and death, and as constantly renewed by fresh accretions of population. It was granted for their use and is held for their benefit. The powers of local government committed to the corporation are precisely of the same character. They were granted and have been confirmed and regulated for the good government of the same public, to preserve order and obedience to law, and to ameliorate and improve their condition and subserve their convenience as a community.

There are a few cases which countenance, to a certain extent, the views of the defendants' counsel, which will be briefly noticed. [The learned Judge then commented upon *Bailey* v. *Mayor of New York*, 3 Hill, 531; *Britton* v. *The Mayor*, &c., 21 Howard Practice Rep. 251; *Benson* v. *The Mayor*, &c., 10 Barbour, 223; *People* v. *Hawes*, 37 Barbour, 440; and *Atkins* v. *Randolph*, 31 Vermont, 226.]

It is unnecessary to say whether the legislative jurisdiction would extend to diverting the city property to other public use than such as concerns the city, or its inhabitants; for this act, if the effect suggested is attributed to the judgment for riot damages, devotes the property which may be seized on execution to legitimate city purposes, namely, to reimbursing those who have suffered damages on account of the inefficiency of the city authorities to protect private property from the aggressions of a mob. I am of opinion that the order appealed from should be affirmed, on the ground that the means provided by the statute to raise money to pay for the damages in question were not hostile to any provision of the Constitution.

All the judges concurred, except DAVIES, J., who, though for affirmance, dissented from some of the views of the chief judge, in respect to the corporate property, and INGRAHAM, J., who delivered an opinion for reversal. [INGRAHAM, J., did not express any opinion adverse to the validity of the statute, so far as it applies to the county or the power of the legislature to make the amount recovered a county charge, to be raised by taxation or loan, but simply as to the right of the legislature to impose such liabilities upon the corporation of the city of New York so as to bind their property for the payment of the recovery.]

Judgment affirmed.

PROPRIETORS OF MOUNT HOPE CEMETERY *v.* BOSTON.

1893. 158 *Massachusetts*, 509.[1]

PETITION for a writ of mandamus to compel the city of Boston to convey Mount Hope Cemetery to the petitioning corporation in accordance with Statute 1889, Chapter 265. Hearing before KNOWLTON, J., who reserved the case for the full court on the petition, answers, and

[1] Statement abridged. Part of opinion omitted. — ED.

such of his findings as were competent to be considered. The material facts are stated in the opinion.

W. Gaston & J. B. Richardson, (*S. W. Creech, Jr.*, with them,) for petitioners.

T. M. Babson and *S. D. Charles*, for respondents.

ALLEN, J. Over property which a city or town has acquired and holds exclusively for purposes deemed strictly public, that is, which the city or town holds merely as an agency of the State government for the performance of the strictly public duties devolved upon it, the Legislature may exercise a control to the extent of requiring the city or town, without receiving compensation therefor, to transfer such property to some other agency of the government appointed to perform similar duties, and to be used for similar purposes, or perhaps for other purposes strictly public in their character. Thus much is admitted on behalf of the city, and the doctrine is stated and illustrated in many decisions. *Weymouth & Braintree Fire District* v. *County Commissioners*, 108 Mass. 142. *Whitney* v. *Stow*, 111 Mass. 368. *Rawson* v. *Spencer*, 113 Mass. 40. *Stone* v. *Charlestown*, 114 Mass. 214. *Kingman, petitioner*, 153 Mass. 566, 573. *Meriwether* v. *Garrett*, 102 U. S. 472. *Mayor, &c. of Baltimore* v. *State*, 15 Md. 376.

By a quite general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain with payment of compensation. This distinction we deem to be well founded, but no exact or full enumeration can be made of the kinds of property which will fall within it, because in different States similar kinds of property may be held under different laws and with different duties and obligations, so that a kind of property might in one State be held strictly for public uses, while in another State it might not be. But the general doctrine that cities and towns may have a private ownership of property which cannot be wholly controlled by the State government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen. *Board of Commissioners* v. *Lucas*, 93 U. S. 108, 114, 115. *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 533. *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 172. *Cannon* v. *New Orleans*, 20 Wall. 577. *Mayor, &c. of New York* v. *Second Avenue Railroad*, 32 N. Y. 261. *People* v. *Batchellor*, 53 N. Y. 128. *People* v. *O'Brien*, 111 N. Y. 1, 42. *Webb* v. *Mayor, &c. of New York*, 64 How. Pr. 10. *Montpelier* v. *East Montpelier*, 29 Vt. 12. *Western Saving Fund Society* v. *Philadelphia*, 31 Penn. St. 175. *People* v. *Detroit*, 28 Mich. 228, 235, 236, 238. *People* v.

Hurlbut, 24 Mich. 44. *Detroit* v. *Detroit & Howell Plank Road*, 43 Mich. 140. *Thompson* v. *Moran*, 44 Mich. 602. *Louisville* v. *University of Louisville*, 15 B. Mon. (Ky.) 642. *Richland* v. *Lawrence*, 12 Ill. 1. *People* v. *Mayor, &c. of Chicago*, 51 Ill. 1. *Grogan* v. *San Francisco*, 18 Cal. 590. *Hewison* v. *New Haven*, 37 Conn. 475. The same conclusion is arrived at, after a full and clear discussion of the subject, in Dillon, Mun. Corp. (4th ed.) §§ 66–68, and notes. See also Cooley, Taxation, 688.

In this Commonwealth the question has not directly arisen in reference to the power of the Legislature to compel a transfer of the property of a city or town, but the double character of cities and towns in reference to their duties and liabilities has very often been adverted to. When a city or town acts merely as an agent of the State government in performing duties for the general benefit, it is usually held free from liability to persons who sustain injuries through negligence, except in the case of defective highways, which constitute an exception to the general rule. But in other cases, where an element partly commercial comes in, a liability is usually enforced. *Tindley* v. *Salem*, 137 Mass. 171, 172, and cases cited. *Worden* v. *New Bedford*, 131 Mass. 23. *Bailey* v. *Mayor, &c. of New York*, 3 Hill (N. Y.), 531. In such cases, the ultimate question usually is, Did the Legislature mean that the city or town, or other creature of statute, should be liable for negligence, or did it not? *Howard* v. *Worcester*, 153 Mass. 426. *Southampton & Itchin Bridge* v. *Southampton*, 8 El. & Bl. 801, 812. *Cowley* v. *Mayor, &c. of Sunderland*, 6 H. & N. 565, 573. *Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686, 707, 709, 710, 721. But in determining this question courts make a discrimination in respect to the character of the duties and of the property which are involved. Nowhere else has this ground of distinction been more often or more strongly insisted on than in Massachusetts. See cases cited in *Tindley* v. *Salem*, 137 Mass. 171, 174; *Pratt* v. *Weymouth*, 147 Mass. 245, 254; *Neff* v. *Wellesley*, 148 Mass. 487, 493; *Lincoln* v. *Boston*, 148 Mass. 578; *Curran* v. *Boston*, 151 Mass. 505, 508. In the recent case of *Merrimack River Savings Bank* v. *Lowell*, 152 Mass. 556, we had occasion to make an analogous discrimination between the general duty which the city of Lowell was under to furnish water on equal terms to all its inhabitants, and the particular undertaking to furnish water for a year to an individual who had paid a year's rates in advance.

In the case before us, we have to determine whether the title of the city of Boston to the Mount Hope Cemetery is subject to legislative control, and this involves an inquiry to some extent into the usages and laws in this Commonwealth relating to burying grounds, with a view of ascertaining whether, in the ownership of such property, towns have heretofore been regarded or have acted merely as agencies of the State government.

[After a very full statement as to the usages and legislation of the State, the opinion proceeds:]

Such being the laws and usages of the Commonwealth before the time when the city of Boston made its first purchase of the Mount Hope Cemetery, the city, by St. 1849, c. 150, was "authorized to purchase and hold land for a public cemetery in any town in this Commonwealth, and to make and establish all suitable rules, orders, and regulations for the interment of the dead therein, to the same extent that the said city of Boston is now authorized to make such rules, orders, and regulations for the interment of the dead within the limits of the said city."

Before any purchase under this statute was made, a general statute was passed which included Boston, St. 1855, c. 257, § 1, providing that "Each city and town in the Commonwealth shall provide one or more suitable places for a burial ground, within which the bodies of persons dying within their respective limits may be interred," and forbidding the use for the burial of the dead of any land in any city or town other than that already used or appropriated for that purpose, without permission. It also was, and long had been, the duty of the overseers of the poor of each town to bury paupers and indigent strangers dying therein. St. 1793, c. 59, §§ 9, 13. Rev. Sts. c. 46, §§ 13, 16. (See also, for later statutes on the same subject, Gen. Sts. c. 70, §§ 12, 15; Pub. Sts. c. 84, §§ 14, 17, enlarging their duties.) Being under these positive duties, and having authority under St. 1849, c. 150, to go outside of the city limits for a burial ground, the city of Boston purchased the largest portion of the land of the Mount Hope Cemetery in West Roxbury in 1857, and has since added to the same at various times, and has received large sums from the sale of lots or burial rights, and has expended large sums in the care and management thereof, and about forty acres still remain unsold. There is no suggestion in argument that in any of these particulars it has acted beyond its powers.

We are not aware that the sale of burial rights in this cemetery has ever been limited to inhabitants of Boston. No such limitation is expressed in the ordinance, but sales may be made to any person or persons. Rev. Ordinances, 1885, c. 47, § 4. By St. 1877, c. 69, § 7, re-enacted in Pub. Sts. c. 82, § 15, towns may sell exclusive burial rights to any persons, whether residents of the town or otherwise, in their cemeteries; and this right extends to cities. Pub. Sts. c. 3, § 3, cl. 23. There can be no doubt that the city held this cemetery not only for the burial of poor persons, but with the right to make sales of burial rights to any persons who might wish to purchase them, whether residents or non-residents. With these duties, and also with these rights and privileges, the city has acquired and improved this property. It is not as if the land had been procured and used exclusively as a place for the free burial of the poor, or of inhabitants of Boston. In addition to these purposes, the city has

been enabled to provide a well ordered cemetery, with lots open to purchase, under carefully prepared rules and regulations, and thus to afford to its inhabitants the opportunity to buy burial places without being compelled to resort to private cemetery companies, where the expense would probably be greater; and it has done this upon such terms that the burial of its paupers has been practically without expense in the past, and it has about forty acres remaining, the proceeds of which when sold would go into the city treasury but for the requirement of St. 1889, c. 265.

The St. of 1889, c. 265, requires the city to transfer to the newly formed corporation, called "The Proprietors of Mount Hope Cemetery," without compensation, this cemetery, with the personal property pertaining thereto, and with the right to any unpaid balances remaining due for lots already sold, and the annual income of certain funds held for the perpetual care of lots. If such transfer is made, all that the city would retain would be the right to bury such persons as it is or may be by law obliged to bury in a certain prescribed portion of the cemetery. Its previous conveyances of lots and rights of burial are expressly confirmed. But it is apparent from the considerations heretofore expressed, that this is not property which is held exclusively for purposes strictly public. The city of Boston is possessed of much other property which in a certain sense and to a certain extent is held for the benefit of the public, but in other respects is held more like the property of a private corporation. Notably among these may be mentioned its system of water works, its system of parks, its market, its hospital, and its library. In establishing all of these, the city has not acted strictly as an agent of the State government, for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. If its cemetery is under legislative control, so that a transfer of it without compensation can be required, it is not easy to see why the other properties mentioned are not also; and all the other cities and towns which own cemeteries or other property of the kinds mentioned might be under a similar liability.

In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the Constitutions of Massachusetts and of the United States so that the Legislature has no power to require its transfer without compensation. Const. of Mass., Dec. of Rights, Art. X. Const. of U. S., Fourteenth Amendment.

In judging of the validity of the particular statute under consideration, St. 1889, c. 265, there are other reasons leading to the same result. The first is, that the duties of the city in respect to providing a burial place for the poor and for persons dying within its limits are not taken away. The city is still bound to provide one or more

suitable places for the interment of persons dying within its limits; Pub. Sts. c. 82, § 9; and it is still bound to bury its paupers and indigent strangers. Pub. Sts. c. 84, §§ 14, 17. If this cemetery should be conveyed away, under the provisions of St. 1889, c. 265, the city would be bound to provide another. Certainly the mere continuance of the city's right to bury in a limited portion of the cemetery such persons as the law requires it to bury is not a provision adequate to meet the requirement of Pub. Sts. c. 82, § 9, and by the report of facts the portion referred to is not likely to suffice even for the burial of paupers for any great length of time. The city is bound to provide a suitable place for the interment of persons dying within its limits; not poor persons only, but all persons; and the burial of the dead in ground not sanctioned by the city authorities is strictly forbidden. So far as we know, it has never been held that the Legislature may require a city or town, without compensation, to transfer property which it has bought in order to enable it to discharge its statutory obligations, while at the same time its duties and obligations continue to rest upon it. On the other hand, it is justly assumed that, if the property is to be transferred, the duties will be transferred also. *Rawson* v. *Spencer*, 113 Mass. 40. *Commonwealth* v. *Plaisted*, 148 Mass. 375, 386. *Whitney* v. *Stow*, 111 Mass. 368. *Mayor, &c. of Baltimore* v. *State*, 15 Md. 376. But the duty of burying paupers, and of providing a place for the interment of all persons dying in Boston, is not imposed upon the petitioner. The duties of the city, and the duties of the petitioner under St. 1889, c. 265, are not the same.

Moreover, the legislative power over municipal property, when it exists, does not extend so far as to enable the Legislature to require a transfer without compensation to a private person or private corporation. The control which the Legislature may exercise is limited; it must act by public agencies and for public uses exclusively. If the city has purchased property for purposes which are strictly and purely public, as a mere instrumentality of the State, such property is so far subject to the control of the Legislature that other instrumentalities of the State may be substituted for its management and care; but even the State itself has no power to require the city to transfer the title from public to private ownership. Upon the division of counties, towns, school districts, public property with the public duty connected with it is often transferred from one public corporation to another public corporation. But it was never heard of that the Legislature could require the city without compensation to transfer its city hall to a railroad corporation, to be used for a railway station, merely because the latter corporation has a charter from the Legislature, and owes certain duties to the public.

It is contended in behalf of the petitioner that it is a public corporation, wholly under the control of the Legislature. But it is an error to suppose that a corporation becomes a public one merely by receiv-

ing a charter from the Legislature, by owing certain duties to the public, and by being subject to rules and regulations established in the exercise of the police power. There is nothing in the case cited — *Woodlawn Cemetery* v. *Everett*, 118 Mass. 354 — to show that the Woodlawn Cemetery was regarded as a public corporation. It clearly was not so. It was said to be subject to the police power, like other cemetery corporations. *Commonwealth* v. *Fahey*, 5 Cush. 408. But liability to the exercise of the police power rests on different considerations, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation. The distinction between public and private corporations is well marked and clear. Public corporations are governmental and political, like counties, cities, towns, school districts, — mere departments of the government, established by the Legislature, and modified, and destroyed, without their own consent. Private corporations are formed by the voluntary agreement of their members, and cannot be established without the consent of the corporators. Public corporations, as has been seen, may to some extent in relation to the ownership of property partake of the character of private corporations; and, on the other hand, many private corporations are charged with some duties and obligations to the public, as in the case of railroad, telegraph, canal, bridge, gas, and water companies. *Lumbard* v. *Stearns*, 4 Cush. 60. *Worcester* v. *Western Railroad*, 4 Met. 564. *Commonwealth* v. *Smith*, 10 Allen, 448, 455. But the general line of distinction between the two classes of corporations is clear. *Linehan* v. *Cambridge*, 109 Mass. 212. *Rawson* v. *Spencer*, 113 Mass. 40, 45. Morawetz on Corp. §§ 3, 24, 1114. 2 Kent Com. 275. 1 Dillon, Mun. Corp. (4th ed.) §§ 19, 22, 44, 54, 56. Angell & Ames on Corp. §§ 14, 30, *et seq.* *University of Maryland* v. *Williams*, 9 Gill & J. 365, 397. *Ten Eyck* v. *Delaware & Raritan Canal Co.* 3 Harr. (N. J.) 200. *Hanson* v. *Vernon*, 27 Iowa, 28, 53. *In re Deansville Cemetery Association*, 66 N. Y. 569.

An examination of the provisions of St. 1889, c. 265, leaves no doubt that the petitioner falls within the class of private corporations. Its corporate members are such of the proprietors of burial lots in the existing cemetery as shall accept the act and notify the clerk of the corporation of such acceptance. Membership is wholly voluntary, and in point of fact only about one person out of eight who were entitled to do so became members. The corporation is to be subject to all the provisions of the Pub. Sts. c. 82, so far as they can be applied thereto, and except so far as inconsistent with St. 1889, c. 265. Chapter 82 of the Public Statutes relates mostly to private cemetery companies, which may be organized by any ten or more persons. *Jenkins* v. *Andover*, 103 Mass. 94, 104. Such private cemetery corporation may lay out its real estate into lots, and upon such terms, conditions, and regulations as it shall prescribe may grant and convey the exclusive right of burial, etc. There is

nothing in St. 1889, c. 265, limiting this right, unless in § 5, providing that the city shall continue to have the right of burial, in a certain prescribed portion of the cemetery, of persons for whose burial it is or may be bound by law to provide, viz. paupers and indigent strangers. Subject to this, the petitioner may sell all the remaining lots, as fast as it can, to all applicants. It is true, under Pub. Sts. c. 82, § 2, it cannot make dividends from the proceeds of sales; but the Proprietors of the Cemetery at Mount Auburn, and many other private cemetery corporations, are under the like restriction. If the city retains the ownership, it may devote the proceeds of sales of lots, after providing for the suitable maintenance of the cemetery, towards the purchase of a new burial place for its inhabitants when occasion may require. If the petitioner owns it, the city will lose that advantage. No duty to the public is imposed upon the petitioner by the terms of the statute, unless it is contained in the words in § 4 of St. 1889, c. 265, "to be held by said corporation, so far as consistent herewith, for the same uses and purposes, and charged with the same duties, trusts, and liabilities for and subject to which the same are now held by said city"; and the further words, "and the said corporation shall have in respect of said cemetery all rights, powers, and privileges, and be subject to all duties, obligations, and liabilities, now had or sustained by said city in respect thereof." What these duties towards the inhabitants of Boston are, it may be difficult to say. Certainly there appears to be nothing binding the corporation to give any preference to inhabitants of Boston in the sale of burial rights, or to prevent a substantial increase in the prices of such burial rights, at the will of the corporation. In short, there is nothing in the act to secure to the inhabitants of Boston those privileges in respect to burial rights which they might properly expect, even if they could not legally demand the same, from the city itself. There is therefore no ground on which the petitioner can be said in any just sense to be a public corporation, and its duties to the inhabitants of Boston are at best but vague and shadowy.

The city further urges that the obligation of the contracts into which it has entered with purchasers of burial rights, for the perpetual care of their lots, would be impaired by the provisions of St. 1889, c. 265. Since, for the reasons already given, we are of opinion that the statute was beyond the power of the Legislature, it is not necessary to consider this ground of objection to its validity.

Petition dismissed.

CHAPTER II.

RIGHTS AND REMEDIES OF CREDITORS — HOW AFFECTED BY ACTS OF THE LEGISLATURE.

HORNER *v.* COFFEY.

1853. 25 *Mississippi*, 434.[1]

FISHER, J. This case is before us upon an appeal from a decree of the vice-chancery court at Natchez.

The only point presented by the record for adjudication is, whether the individual property of the appellee, one of the selectmen and an inhabitant of the town of Grand Gulf, is liable to levy for the purpose of satisfying a judgment against the president and selectmen of said town in their corporate capacity.

The seventh section of the act of the legislature, incorporating the town of Grand Gulf, says: "That the said president and selectmen are constituted a body politic and corporate in fact; and in the name of the town of Grand Gulf, and by that name, they and their successors in office shall have perpetual succession, shall have a common seal, may purchase, hold, and convey property; and by the name and style aforesaid, shall be persons capable in law of suing and being sued in all manner of suits or actions, either at law or in equity," — "and may do all other acts incident to bodies corporate."

The tenth section of the act, gives the president and selectmen power to raise a revenue for town purposes, by taxing such property as is liable to taxation under the existing laws of this state, "Provided such tax shall not exceed twenty-five cents on every hundred dollars' worth of such property in any one year." Acts of 1833, 96, 97. These being the only provisions of the charter bearing upon the question under consideration, it will at once appear, that it contains no express provision in regard to the right asserted by the appellant, to resort to the individual property of the inhabitants of the town, for the purpose of discharging her judgment against the corporation. Hence we must look alone to the common law for the rules to guide us in our decision.

With respect to private corporations, such as banks or insurance companies, it is conceded, that no individual responsibility attaches to

[1] Statement and arguments omitted. — ED.

the members for the corporate debts. "A different rule prevails," say some of the authorities, "with regard to the inhabitants of any district; as counties or towns incorporated by statute, which come under the head of *quasi* corporations; for against them no private action will lie unless given by statute; and if a power to sue them is given by statute, each inhabitant is liable to satisfy the judgment." Angell & Ames on Corp. 498, 499. The same rule is more broadly stated by the supreme court of Connecticut, in the case of *Beardsley* v. *Smith*, 16 Conn. R. 368. The court on that occasion used the following language: "We know, that the relation in which the members of municipal corporations in this State have been supposed to stand in respect to the corporation itself, as well as to its creditors, has elsewhere been considered in some respects peculiar. We have treated them, for some purposes, as parties to corporate proceedings, and their individuality has not been considered as merged in their corporate connection. Though corporators, they have been holden to be parties to suits by or against the corporation, and individually liable for its debts." "Such corporations are of a public and political character; they exercise a portion of the governing power of the State. Statutes impose upon them important public duties. In the performance of these, they must contract debts and liabilities, which can only be discharged by a resort to individuals, either by taxation or execution. Taxation in most cases can only be the result of the voluntary action of the corporation, dependent upon the contingent will of a majority of the corporators, and upon their tardy and uncertain action. It affords no security to creditors, because they have no power over it."

The same doctrine, in language equally strong, has been, in repeated decisions, announced by the supreme court of Massachusetts, and it is, perhaps, now the settled law of all the New England States.[1] In view of the numerous authorities, emanating from judicial tribunals as enlightened as those of the New England States, thus settling the law, we have been induced to give the question involved in the case before us a much more thorough examination than it otherwise would have received at our hands. This examination has only served to strengthen the opposition which we from the first conceived against the rule, as well as the principles upon which it has been settled by the authorities cited. We submit with all proper deference and respect, that neither position assumed by the court in the case of *Beardsley* v. *Smith* can be sustained by any principle of the common law, in reference to the inhabitants of the town of Grand Gulf. These positions are, first, that the inhabitants of the town are parties to all suits by or against the corporation; and, secondly, the charter authorizing a suit against the corporation, the inhabitants are personally liable to discharge the judgment when obtained.

[1] The constitutionality of a statute permitting the judgment-creditor of the town to levy upon the individual property of the inhabitants, was affirmed in *Eames* v. *Savage*, 77 Maine, 212. — Ed.

In regard to the first position, the suit was in this instance against the corporation. The record shows no other defendant. Hence, if the inhabitants were parties to the suit, they became such by operation of law. Before the law will make, or even presume a man to be a defendant to a suit against another, he must be shown to have been a party to the cause of action upon which it is founded. Were the inhabitants of the town of Grand Gulf parties to the cause of action in this instance? and if so, was it their own act, or that of the corporation, that made them such? If of the corporation, had it power to perform the act? The tenth section of the charter already noticed furnishes a conclusive answer to these several inquiries. It prescribes the manner in which, and the extent to which the corporation must act and may go in this respect. The statute prescribing the mode in which an act must be performed, is a negative upon all other modes for performing it. Whence it is manifest that the inhabitants of the town were not parties to the cause of action. They could not, therefore, be parties to the suit, for the plain reason that they had violated no legal duty. A suit is but a remedy given by law to enable a party who has been injured by the act or violation of duty by another, to recover damages equal to the injury or loss sustained. If the duty never existed, it could not be violated; and without both its existence and violation, there was no ground for a suit against the inhabitants of the corporation.

But there is still another light in which this question may be presented. If the doctrine be true, that the inhabitants of an incorporated town are by operation of law parties to all suits by or against such corporation, then it follows, that however just his claim may be, an inhabitant could not, under any circumstances, either maintain a suit or enforce a judgment against the corporation. The moment he appears as a plaintiff on the record, the law makes him a defendant jointly with the corporation in the same action. And if he should be so fortunate as to escape a plea in abatement, or a demurrer, if the fact appeared of record, and obtain his judgment, his own property would be as much liable as that of any other inhabitant, to satisfy the execution. This shows to what the doctrine must lead, and, consequently, its utter absurdity.

We will now proceed to consider the second question stated in Angell and Ames, in this language, to wit: "If a power to sue the corporation is given by statute, each inhabitant is liable to satisfy the judgment." This doctrine, in certain cases, is unquestionably correct; but it has no application to a corporation like that of the town of Grand Gulf, or the city of Bridgeport, spoken of in *Beardsley* v. *Smith*. The rule is this: that whenever either the common law or a statute requires the inhabitants of a particular district of country, such as a county town or hundred in England, to perform certain duties, and they fail in this respect, in consequence of which a statute authorizes a suit by the party injured against the inhabitants, then the judgment in such case may be wholly satisfied out of the property of any one of said inhabitants. This

is all according to reason and the principles of the common law. The duty required was, in the first instance, joint and several. Every inhabitant was bound to aid in its performance. All were implicated in its violation, which occasioned the suit. The judgment, in being also joint and several, only partook of the nature of the cause of action upon which it was founded. This was the operation of judgments recovered under the statute of Winton, till its amendment by the act of 43d Elizabeth, which required such judgments to be satisfied by a tax levied equally upon the inhabitants of the hundred.

Here, as we humbly conceive, lies the error into which these learned tribunals have fallen, in not properly discriminating between a duty, in the performance of which the law required every man in the particular district to aid, and for a breach of which all were liable, and a mere power delegated to a corporation for certain specified purposes.

The charter, in this instance, only requires the inhabitants of the town to perform such obligations as the corporate authorities may legally impose upon them. The only obligation which could be thus imposed, is the tax provided for in the tenth section. A failure to impose this tax, or a failure to pay it by the inhabitants, does not make them liable to a judgment against the corporation, for the plain reason that it constituted no cause of action in the first instance. A judgment is only the means provided by law to enable the creditor to get that to which he was entitled before judgment. A creditor could not maintain a suit against any or all of the inhabitants, merely because they were liable to pay a certain tax, and had failed to pay it. Upon what principle, then, can he resort to their property, for the purpose of discharging a judgment against the corporation, to which they are not parties, and against whom a recovery could not have been had, even if they had been parties?

But it is said, that the corporation exercised a portion of the governing power of the State, and, therefore, could exercise its discretion in creating liabilities against the inhabitants of the town. It is true, that the corporation is invested with a subordinate political power, but it is only such as is expressly granted by the charter.

To this extent the inhabitants of the town only agreed to submit to the jurisdiction of the corporation, and the additional burdens which it might impose. Thus acting, it is the creature of law, and can never oppress those under its jurisdiction. Without this restraint its power is arbitrary and despotic, and may be used by the corporate authorities for their own selfish purposes.

The whole case must at last turn upon the question, whether the corporation in its action must be confined strictly to the grants contained in the charter, or whether it may exercise an unlimited authority over the inhabitants of the town. If we adhere to the first position, the case for the appellant cannot even be made plausible under the charter. The corporation possessed no authority to make the people of the town parties to the cause of action, or to the suit, or to make their property liable to the judgment, except in the shape of a tax.

It makes no difference, that the appellee is one of the selectmen. He is only one of seven, and could not alone either levy or enforce a tax under the charter. If he has failed to perform his duty as a corporator, the law gives a remedy against him as well as the others by *mandamus*, to compel them to levy the tax named. He can only be known in the present controversy as an individual, and his rights as such determined.

There is no judgment in the record from which an appeal could be prosecuted. The case will, therefore, be dismissed.

SUPERVISORS OF ROCK ISLAND *v.* U. S. EX REL. STATE BANK.

1866. 4 *Wallace* (*U. S.*), 435.[1]

ERROR to U. S. Circuit Court for Northern District of Illinois.

A statute of Illinois, of February 16, 1863, enacts as follows:

"The board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may, if deemed advisable*, levy a special tax, not to exceed in any one year one per cent. upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness."

At March Term, 1863, the relators recovered judgment against the County of Rock Island upon certain overdue coupons. Nothing was paid upon the judgment, and there was no money in the county treasury which could be so applied.

The relator subsequently requested the supervisors to collect the requisite amount by taxation, and to give him an order on the county treasury for payment. They declined to do either.

He then applied to the court below for a mandamus, compelling the supervisors, at their next regular meeting, to levy a tax of sufficient amount to be applied to pay the judgment, interest, and costs, and when collected to apply it accordingly. An alternative writ was issued.

The supervisors made a return, averring, *inter alia*, that they had levied and collected the regular county taxes, and that the same had all been needed and used for the ordinary current expenses of the county.

[1] Statement abridged. Arguments omitted. — ED.

The court below disallowed the return, and ordered that a peremptory writ should issue, commanding the respondents, at their next meeting for levying taxes, to levy a tax of not more than one hundred cents on each one hundred dollars' worth of taxable property in the county, but of sufficient amount fully to pay the judgment, interest, and costs; and that they set the same apart as a special fund for that purpose; and that they pay it over without unnecessary delay to the relator.

Cook, for the plaintiffs in error.

James Grant, contra.

SWAYNE, J. [After overruling other objections, and after quoting the statute of Feb. 16, 1863.] The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, "*may, if deemed advisable*," which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument.

In *The King* v. *The Inhabitants of Derby*,[1] there was an indictment against "divers inhabitants" for refusing to meet and make a rate to pay "the constables' tax." The defendants moved to quash the indictment, "because they are not compellable, but the statute only says that *they may*, so that they have their election, and no coercion shall be." The court held that "*may*, in the case of a public officer, is tantamount to *shall*, and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt."

In *The King and Queen* v. *Barlow*,[2] there was an indictment upon the same statute, and the same objection was taken. The court said: "When a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*: thus, 23 Hen. VI, says the sheriff *may* take bail. This is construed he *shall*, for he is compellable to do so."

These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the settled law of both countries.

In *The Mayor of the City of New York*[3] and in *Mason* v. *Fearson*,[4] the words "it shall be lawful" were held also to be mandatory.[5]

The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us,

[1] Skinner, 370. [2] 2 Salkeld, 609. [3] 3 Hill, 614. [4] 9 Howard, 248.

[5] See The Attorney-General *v.* Locke, 3 Atkyns, 164; Blackwell's case, 1 Vernon, 152; Dwarris on Stat. 712; Malcom *v.* Rogers, 5 Cowen, 188; Newburg Turnpike Co. *v.* Miller, 5 Johnson's Chancery, 113; Justices of Clark County Court *v.* The P. & W. & K. R. T. Co., 11 B. Monroe, 143; Minner et al. *v.* The Merchants' Bank, 1 Peters, 64; Com. *v.* Johnson, 2 Binney, 275; Virginia *v.* The Justices, 2 Virginia Cases, 9; Ohio ex rel. *v.* The Governor, 5 Ohio State, 53; Coy *v.* The City Council of Lyons, 17 Iowa, 1.

or in equivalent language — whenever the public interest or individual rights call for its exercise — the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose "a positive and absolute duty."

The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category.[1]

The Circuit Court properly awarded a peremptory writ of mandamus. We find no error in the record. The judgment below is

Affirmed.

VON HOFFMAN *v.* CITY OF QUINCY.

1866. 4 *Wallace*, 535.[2]

ERROR to U. S. Circuit Court for Southern District of Illinois.

Petition for *mandamus*.

The relator was the owner of overdue coupons, which, when issued, were attached to bonds issued by the city in payment for railroad stock, subscribed for by the city under certain statutes, passed in 1851, 1853, and 1857.

By the provisions of these several acts the city was authorized to collect a special annual tax upon the property, real and personal, therein, sufficient to pay the annual interest upon any bonds thereafter issued by the city for railroad purposes, pursuant to law. It was required that the tax, when collected, should be *set aside*, and held separate from the other portions of the city revenue, as a fund specially pledged for the payment of the annual interest upon the bonds aforesaid. It was to be applied to this purpose, from time to time, as the interest should become due, "*and to no other purpose whatsoever.*"

The city failed to pay the coupons held by the relator for a long time after they became due, and refused to levy the tax necessary for

[1] The People *v.* Sup. Court, 5 Wendell, 125; The People *v.* Sup. Court, 10 Wendell, 289; The People *v.* Vermilyea, 7 Cowen, 393; Hull *v.* Supervisors, 19 John, 260.

[2] Statement abridged. Arguments omitted. Only part of the opinion is given. — ED.

that purpose. The relator sued the city upon them in the court below and at the June Term, 1863, recovered a judgment for $22,206.69 and costs. An execution was issued and returned unsatisfied. The judgment was unpaid. The city still neglected and refused to levy the requisite tax. He therefore prayed that a writ of *mandamus* be issued, commanding the city and its proper officers to pay over to him any money in their hands otherwise unappropriated, not exceeding the amount of the judgment, interest, and costs; and, for want of such funds, commanding them to levy the special tax as required by the acts of the legislature before referred to, sufficient to satisfy the judgment, interest, and costs, and to pay over to him the proceeds.

The city filed an answer relying on the act of Feb. 14, 1863, which contains the following provisions:

"Section 4. The city council of said city shall have power to levy and collect annually taxes on real and personal property within the limits of said city as follows: [After providing for taxation for certain special purposes:] On all real and personal property within the limits of said city, to pay the debts and meet the general expenses of said city, not exceeding fifty cents on each one hundred dollars per annum on the annual assessed value thereof.

"Section 5. All laws and parts of laws, other than the provisions hereof, touching the levy or collection of taxes on property within said city, except those regulating such collection, and all laws conflicting herewith are hereby repealed; . . ."

The answer averred that the full amount of the tax authorized by this act had been assessed, and was in the process of collection; that the power of the city in this respect has been exhausted: "and that the said fifty cents on the one hundred dollars, when collected, will not be sufficient to pay the current expenses of the city for the year 1864, and the debts of the said city."

The relator demurred to the answer, and judgment was given against him.

McKinnon and *Merrick*, for plaintiff in error.

Cushing and *Ewing, Jr., contra.*

SWAYNE J. . . . The Constitution of the United States declares (Art. I. s. 10), that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

. . . . . .

It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof

of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement.[1]

. . . . . .

Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.

. . . . . .

It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void.[2]

If these doctrines were *res integræ* the consisteney and soundness of the reasoning which maintains a distinction between the contract and the remedy — or, to speak more accurately, between the remedy and the other parts of the contract — might perhaps well be doubted.[3] But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance.

When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

[1] Green *v.* Biddle, 8 Wheaton, 92; Bronson *v.* Kinzie, 1 Howard, 319; McCracken *v.* Hayward, 2 Id. 612; People *v.* Bond, 10 California, 570; Ogden *v.* Saunders, 12 Wheaton, 231.

[2] Bronson *v.* Kinzie, 1 Howard, 311; McCracken *v.* Hayward, 2 Id. 608.

[3] 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr. Justice Washington's dissenting opinion in Mason *v.* Haile, 12 Wheaton, 379.

It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases.[1] It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other.[2]

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right — of no practical value — and render the protection of the Constitution a shadow and a delusion.

The Circuit Court erred in overruling the application for a *mandamus*. The judgment of that court is REVERSED, and the cause will be remanded, with instructions to proceed

In conformity with this opinion.

STATE EX REL. MARCHAND *v.* CITY OF NEW ORLEANS.

1885. 37 *Louisiana Annual*, 13.[3]

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe*, J.

Blanc and *Butler*, for the relators and appellees.

C. F. Buck, City Attorney, *contra*.

FENNER, J. In 1872, the Legislature of the State passed Act No. 60 of that year, by which it established the Luzenberg Hospital in this city as the exclusive hospital for small-pox and further provided that "all indigent cases of small-pox, or other diseases reported contagious, in want of or making application for hospital aid or care, shall be sent to the hospital designated in this act, at the expense of the city of New Orleans, as usual and at the usual *per diem*."

Acting under this direction, the city entered into a contract with Dr. Anfoux then in charge of said hospital by which he was to receive and treat such patients at a stipulated compensation of thirty-five dollars.

[1] New Jersey *v.* Wilson, 7 Cranch, 166; Dodge *v.* Woolsey, 18 Howard, 331; Piqua Branch *v.* Knoop, 16 Id. 331.

[2] People *v.* Bell, 10 California, 570; Dominic *v.* Sayre, 3 Sandford, 555.

[3] Arguments omitted. — ED.

per case. During the year 1873 he received and treated a large number of cases, for which the amount due by the city under the contract was $19,670.

In 1878 suit was brought and judgment recovered against the city on the foregoing cause of action and for the amount above stated, with interest and costs.

The judgment thus rendered was duly registered July 5th, 1878, pursuant to the provisions of Act No. 5, of 1870. This registration has produced no results; the judgment has not been paid; and the evidence makes it manifest that under the city's construction of its duties under the Act No. 5, and under its modes of execution thereof, many years must elapse before any payment will be made upon this judgment.

The reason why this debt remains, and promises to remain, unpaid, is that the city construes her power and duty of taxation to be governed and limited by the provision of the Constitution of 1879 to a tax of ten mills on the dollar, in so far as provision for such judgments is concerned, and that the requirements for her alimony leave, out of the receipts from this tax, nothing or little to be appropriated to the satisfaction of judgments.

To this the creditor answers that he is a creditor by contract; that, at the date of his contract, the city possessed, by law, a power of taxation for "current city expenses exclusive of interest and schools" only limited to one and one-quarter *per cent.*; that *quoad* this contract obligation and so far as necessary for its satisfaction, this power of taxation still exists unaffected by subsequent legislative or constitutional provisions; that, under the Act No. 5 of 1870, it is the duty of the city authorities to provide for the payment of his registered judgment by setting apart in the annual budget a sum for that purpose, and that, in order to execute this duty, the correlative duty is imposed of exercising the power of taxation vested in the city by law to the extent necessary to raise the means to make such provision.

In pursuance of these views, the present suit was instituted for a mandamus directing the city authorities to execute and perform the duties imposed by the Act No. 5 of 1870; and, in accordance therewith, to set apart in the next annual budget sufficient money to pay such judgment; and further directing them to provide in said budget, by taxation for current city expenses, in excess of the amount allowed by law for the alimony of the city but not in excess of one and one-quarter *per cent.*, the means of revenue necessary to pay relator's said judgment, and so to do, in all succeeding annual budgets, until the same be paid.

From a judgment making the mandamus peremptory, the city has appealed.

We lay down the following propositions of fact and law viz.:

1st. The judgment was founded on a contract entered into in 1872.

2d. At the date of the contract, the city possessed a power of taxa-

tion for general expenses " exclusive of interest and schools," of twelve and one-half mills *per annum*. See Act No. 73 of 1872, Sec. 15.

3d. Under the consistent jurisprudence of the Supreme Court of the United States and of this Court, the power of taxation existing at the date of the contract is read into the contract and continues to exist, so far as necessary for the enforcement of the obligations of the contract, irrespective of any subsequent legislation or constitutional enactments restricting the power of taxation. State *ex rel.* Moore vs. City, 32 Ann.; State *ex rel.* Dillon vs. City, 34 Ann. 477; State *ex rel.* Carriere vs. City, 36 Ann.; Von Hoffman vs. Quincy, 4 Wall. 535; Wolff vs. New Orleans, 103 U. S. 358; Nelson vs. St. Martin, 111 U. S. 720.

4th. This Court has long since held that the prohibitions against the issuance of the writ of mandamus against officers of the city of New Orleans contained in Act No. 5 of 1870, apply only to the cases therein specially designated and that, for the performance of the duties imposed by that act itself, the writ of mandamus was a proper remedy. State *ex rel.* Carondelet vs. New Orleans, 30 Ann. 129.

5th. In the same case it was held that, under Act No. 5 of 1870, it is the " plain duty " of the city authorities " to provide for the payment of registered judgments in the only mode in which judgment creditors of the city are permitted to collect their judgments. This requires the action of the Mayor and Administrators, in their aggregate capacity as a municipal government; the adoption of the annual budget; the levy of the necessary taxes; and a setting apart of a sufficient amount to pay this and other registered judgments. * * The duty of the city to make this provision is not discretionary as to time or manner. The law imperatively requires that it shall be in the next annual budget, and by setting apart, appropriating a sufficient amount out of the annual revenues." State *ex rel.* Carondelet vs. New Orleans, 30 Ann. 129.

This duty, we have held, however, is subordinate to the higher and absolute duty of first providing, out of the revenues applicable to that purpose, for the necessary alimony or support of the city. State *ex rel.* Moore vs. City; Saloy vs. City.

6th. In the DeLeon case we held that the duty to appropriate and set apart money in the annual budget for particular purposes " involved necessarily the duty to levy such tax (within the power of taxation possessed, at the time, by the corporation) as will render possible the performance of the duty." State *ex rel.* DeLeon vs. City, 34 Ann., p. 477.

7th. The relator herein claims and is entitled to no special tax. He is simply entitled to payment out of the revenues arising from the collection of taxes provided for the general expenses of the city. He simply asks that the power of taxation conferred by law for that purpose shall be exercised to the extent necessary to furnish the means out of which his judgment may be paid.

So far as relator's contract and judgment are concerned, we have

already shown that the city possesses a power of taxation for general purposes of twelve and one-half mills. She has, heretofore, exercised, and proposes hereafter to exercise this power only to the extent of *ten mills* on the dollar, and, as the revenues arising from this tax are applicable to, and required for, the necessary alimony of the city, they leave, as we have said, little or nothing, which can be appropriated for the payment of registered judgments.

From the foregoing statement, it appears that, to the extent necessary for the provision for payment of plaintiff's judgment, the city possesses a residuary power of taxation of two and one-half mills, not exercised and which she refuses to exercise, the revenues from which would, under no circumstances, be applicable to the city's alimony, or, indeed, to any other purpose than that of satisfying relator's judgment and others standing in like case with it. It would be, indeed, an anomaly, if the city could escape from or postpone her clear duty, to provide for the satisfaction of such judgments, by simply abstaining from the exercise of lawful powers of taxation to an extent necessary to provide the means of paying them. Such an anomaly could never be sanctioned by any court of justice, since it would render the payment of debts no longer obligatory upon municipal corporations, but dependent purely upon their will and caprice.

From the foregoing considerations it would conclusively appear that relators are entitled to the relief which they seek, unless there is something in the nature of their debt, or in the law existing at the date of their contract, which debars it. Legislation subsequent to the contract has, and can have, no effect upon the rights and obligations arising from the contract.

The learned counsel for the city propounds two special defenses based upon the nature of plaintiff's debt and the law in existence at the date of the contract.

1st. He contends that, from the very nature and constitution of municipal corporations, they are incapable of creating or contracting a debt for current expenses, in excess of the revenues arising from taxation, within the limitations imposed by law, for the year in which the debt was created; and that such debt, whether created by contract or not, can only demand satisfaction out of the revenues of that year.

If such had been the law of Louisiana, as applicable to the city of New Orleans, in 1873, it is passing strange that, in 1874, it should have been deemed necessary to pass a constitutional amendment establishing the very principles which, it is contended, already existed and were inherent in the very nature of the corporation.

We have rigidly enforced the constitutional amendment of 1874, as applicable to debts created after its passage. Taxpayers vs. New Orleans, 33 Ann. 568.

But when we are asked to recognize the principles established by that amendment as existing independent of it and prior to its passage, and as applicable to debts contracted prior thereto, we must pause.

The proposition is supported by no authority and by no well founded reason. It is contradicted by the entire financial administration of the city prior to 1874, by the uniform current of judicial interpretation which has constantly rendered and enforced judgments upon such obligations without restriction to the revenues of particular years, and by the terms and spirit of the Act No. 5 of 1870 itself.

For what would be the sense of requiring the city authorities to provide in coming budgets for registered judgments, without distinction, if such judgments could only seek satisfaction out of the revenues of some antecedent year in which the debts were contracted? We dismiss the proposition as utterly untenable.

Nor is there anything in the nature of the debt which prevents this contract from being protected from impairment under the Constitution of the United States. The protection afforded by that instrument is not restricted to bonds or any particular forms of contract. It covers all contracts. Every lawful contract of a municipal corporation is entitled to satisfaction by the exercise of the power of taxation possessed by the corporation at its date, to the extent necessary, and to invoke the continued and repeated exercise of that power until the debt is satisfied.

Such is the clear and unequivocal doctrine announced by the Supreme Court of the United States uniformly and specially in the very recent case of Nelson vs. St. Martin, 111 U. S. 716.

. . . . . .

We are not called upon to consider the rights of other judgment creditors whose judgments rank that of relators in order of registry. The record does not advise us whether their judgments are based on contracts or whether they rest upon causes of action arising prior to the constitutional amendment of 1874. It may be that none of them can compete with relators in the relief sought. But, at all events, the unexhausted power of taxation is ample to satisfy all; and if they are entitled to like rights with relators and have neglected to exercise them, there is no reason why relators should suffer.

Let it be well understood that the duty to levy an extra tax is not obligatory under this decree. The city may satisfy the debt out of its revenues under the existing rate of taxation. But the insufficiency of such revenues will be no excuse for not satisfying the judgment and, if necessary, and *only* if necessary, must provision be made by a tax for general expenses above ten mills and within twelve and one-half mills.

Judgment affirmed.

Rehearing refused.

BERMUDEZ, C. J., and POCHÉ, J., take no part in this opinion and decree.

REES *v.* CITY OF WATERTOWN.

1873. 19 *Wallace* (*U. S.*), 107.[1]

Appeal from the Circuit Court for the Western District of Wisconsin; the case being thus:

Rees, a citizen of Illinois, being owner of certain bonds issued under authority of an act of the legislature of the State of Wisconsin, by the city of Watertown, in that State, to the Watertown and Madison Railroad Company, and by the company sold for its benefit, brought suit in the Circuit Court of the United States for the District of Wisconsin, against the city, and, in 1867, recovered two judgments for about $10,000.

In the summer of 1868 he issued executions upon the two judgments thus obtained, which were returned wholly unsatisfied.

In November of the same year he procured from the United States Circuit Court a peremptory writ of mandamus, directing the city of Watertown to levy and collect a tax upon the taxable property of the city, to pay the said judgments; but before the writ could be served, a majority of the members of the city council resigned their offices. This fact was returned by the marshal, and proceedings upon the mandamus thereupon ceased.

In May, 1869, another board of aldermen having been elected, Rees procured another writ of mandamus to be issued, which writ was served on all of the aldermen except one Holger, who was sick at the time of the service upon the others. No steps were taken to comply with the requisition of the writ. An order to show cause why the aldermen should not be punished for contempt, in not complying with its requirements, was obtained, and before its return day six of the aldermen resigned their offices, leaving in office but one more than a quorum, of whom the said Holger, upon whom the writ had not been served, was one. Various proceedings were had and various excuses made, the whole resulting in an order that the aldermen should at once levy and collect the tax; but before the order could be served on Holger, he resigned his office, and again the board was left without a quorum. Nothing was accomplished by their effort in aid of the plaintiff, but fines were imposed upon the recusant aldermen, which were ordered to be applied in discharge of the costs of the proceedings.

In October, 1870, the plaintiff obtained a third writ of mandamus, which resulted as the former ones had done, and by the same means, on the part of the officers of the city. A special election was ordered to be held to fill the vacancies of the aldermen so resigning, but no votes were cast, except three in one ward, and the person for whom they were cast refused to qualify. The general truth of these facts was not denied. No part of the debt was ever paid.

[1] Statement abridged. Argument and part of opinion omitted. — Ed.

In this state of things, the district of Wisconsin having been divided into an eastern and a western district, and the city of Watertown being in the latter, Rees brought suit in the latter district on his judgments obtained in the general district before the division, and got a new judgment upon them for $11,066.

He now filed a bill in the said western district, setting forth the above facts, the general truth of which was not denied; that the debt due to him had never been paid, and that, with an accumulation of fourteen years' interest, the same remained unpaid, and that all his efforts to obtain satisfaction of his judgments had failed. All this was equally undenied.

The bill set forth also certain acts of the legislature of Wisconsin, which, it was alleged, were intended to aid the defendant in evading the payment of its debts, and which, it seemed sufficiently plain, had had that effect, whatever might have been the intent of the legislature passing them.

The bill alleging that the corporate authorities were trustees for the benefit of the creditors of the city, and that the property of the citizens was a trust fund for the payment of its debts, and that it was the duty of the court to lay hold of such property and cause it to be justly applied, now prayed that the court would subject the taxable property of the city to the payment of the judgments. It asked specifically that a decree might be made, subjecting the taxable property of the citizens to the payment of the complainant's judgments, and that the marshal of the district might be empowered to seize and sell so much of it as might be necessary, and to pay over to him the proceeds of such sale.

. . . . . .

The charter of the city contains the following provision:

"Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city."

The judges holding the Circuit Court were divided in opinion upon the questions argued before them. The bill was dismissed. The case was now here on certificate of division and appeal, the error assigned being that the court dismissed the bill, when it ought to have given the relief prayed for.

H. W. and *D. W. Tenney* (*S. U. Pinney* with them), for the creditor appellant.

D. Hall (*M. H. Carpenter* and *H. L. Palmer* with him), *contra.*

HUNT, J. . . . We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place

of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court.

[After referring to authorities upon the power of the court to direct the levy of a tax under the circumstances of this case.]

The plaintiff insists that the court may accomplish the same result under a different name, that it has jurisdiction of the persons and of the property, and may subject the property of the citizens to the payment of the plaintiff's debt without the intervention of State taxing officers, and without regard to tax laws. His theory is that the court should make a decree subjecting the individual property of the citizens of Watertown to the payment of the plaintiff's judgment; direct the marshal to make a list thereof from the assessment rolls or from such other sources of information as he may obtain; report the same to the court, where any objections should be heard; that the amount of the debt should be apportioned upon the several pieces of property owned by individual citizens; that the marshal should be directed to collect such apportioned amount from such persons, or in default thereof to sell the property.

As a part of this theory, the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any inhabitant of the city, leaving the citizens to settle the equities between themselves.

This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of law, even in regard to taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property, to be ascertained by assessment, and when the proportion is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources. There may be repeated taxes and assessments to make up delinquencies, but the principle and the general rule of law are as we have stated.

In relation to the corporation before us, this objection to the liability of individual property for the payment of a corporate debt is presented in a specific form. It is of a statutory character.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money

for the payment of these bonds would be void.[1] But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted he has no cause of complaint.[2]

By section nine of the defendant's charter it is enacted as follows: "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence when the debt was incurred, and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other.[3]

But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says,[4] "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate," of which he cites many instances. Lord Talbot says,[5] "There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by

[1] Van Hoffman *v.* City of Quincy, 4 Wallace, 535.
[2] Cooley, Constitutional Limitations, 285, 287.
[3] Cooley, Constitutional Limitations, 285.
[4] 1 Equity Jurisprudence, § 61.
[5] Heard *v.* Stanford, Cases Tempore Talbot, 174.

law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law, and there be well disposed of.[1]

A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-ninth of Magna Charta and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law — that is, he must be served with notice of the proceeding, and have a day in court to make his defence.[2]

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."[3] In the New England States it is held that a judgment obtained against a town may be levied upon and made out of the property of any inhabitant of the town. The suit in those States is brought in form against the inhabitants of the town, naming it; the individual inhabitants, it is said, may and do appear and defend the suit, and hence it is held that the individual inhabitants have their day in court, are each bound by the judgment, and that it may be collected from the property of any one of them.[4] This is local law peculiar to New England. It is not the law of this country generally, or of England.[5] It has never been held to be the law in New York, in New Jersey, in Pennsylvania, nor, as stated by Mr. Cooley, in any of the Western States.[6] So far as it

[1] 1 Story's Equity Jurisprudence, § 60.

[2] Westervelt v. Gregg, 12 New York, 209. [3] Ib.

[4] See the cases collected in Cooley's Constitutional Limitations, 240–245.

[5] Russel v. Men of Devon. 2 Term, 667.

[6] See Emeric v. Gilman, 10 California, 408, where all the cases are collected.

rests upon the rule that these municipalities have no common fund, and that no other mode exists by which demands against them can be enforced, he says that it cannot be considered as applicable to those States where provision is made for compulsory taxation to satisfy judgments against a town or city.[1]

The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defence to the debt, or by way of exemption, or is without defence, is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest.

Again, in the case of *Emeric* v. *Gilman*, before cited, it is said: "The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment or the levy of the execution. Those who opposed the creation of the liability may be subjected to its payment, while those, by whose fault the burden has been imposed, may be entirely relieved of responsibility. . . . To enforce this right against the inhabitants of a county would lead to such a multiplicity of suits as to render the right valueless." We do not perceive, if the doctrine contended for is correct, why the money might not be entirely made from property owned by the creditor himself, if he should happen to own property within the limits of the corporation, of sufficient value for that purpose.

The difficulty and the embarrassment arising from an apportionment or contribution among those bound to make the payment we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity could make the apportionment more conveniently than could a court of law.[2]

We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established

[1] Cooley's Constitutional Limitations, 246.

[2] 1 Story's Equity Jurisprudence, § 470 and onwards.

remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed.

Judgment affirmed.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice SWAYNE, dissenting:

I dissent from the opinion of the court in this case upon the ground that equity will never suffer a trust to be defeated by the refusal of the trustee to administer the fund, or on account of the misconduct of the trustee, and also because the effect of the decree in the court below, if affirmed by this court, will be to give judicial sanction to a fraudulent repudiation of an honest debt. For which reasons, as it seems to me, the decree of the subordinate court should be reversed.

THOMPSON *v.* ALLEN COUNTY ET ALS.

1885. 115 *U. S.* 550.[1]

APPEAL from U. S. Circuit Court for District of Kentucky.

Bill in equity. The case was tried on bill, answer, exceptions to answer, and a stipulation as to the facts.

Plaintiff had recovered judgment against Allen County on coupons for interest on bonds, issued by the county under authority of an act of the legislature to pay for subscription to railroad stock. Executions were returned "no property found." The act under which the bonds were issued provided that the County Court should levy a tax for "a

[1] Statement abridged. Portions of opinions omitted. — Ed.

sum sufficient to pay the interest on such bonds as it accrues, together with the costs of collecting the same." The act, as amended, also required the County Court to appoint a special collector to collect all taxes levied under it. The U. S. Circuit Court, at the instance of the present plaintiffs, issued a writ of mandamus to the justices of the Allen County Court, under which they levied a tax to pay the plaintiff's judgment. They also elected one Stork collector of said tax levy, but he refused to give bond or to accept the office. The County Court in good faith and diligently endeavored to find a proper person to act as collector, but no proper person could be found who would undertake that office. The parties now agree that the plaintiff is without remedy for the collection of his debt, except through the aid of the U. S. Circuit Court in the appointment of a receiver, as prayed for in the bill, or other appropriate order of the court.

The bill in equity gives the names of about thirty of the principal tax-payers of the county, with the value of the assessed property of each, and the amount of tax due from him under said levy, alleging that the tax-payers were too numerous to be sued, and praying that these might be sued as defendants representing all others in like circumstances, and be required, with the county, to answer the bill.

The prayer of the bill for relief was, that, inasmuch as the complainant was without remedy at law, the court sitting in chancery would appoint a receiver, who should collect these taxes, and that the money arising therefrom be from time to time paid over in satisfaction of plaintiff's judgments, and that the several tax-payers of said county, made defendants, be required to pay into court, with like effect the sums due by them as alleged in the bill.

The justices in the Circuit Court were divided in opinion. In accordance with the view of the presiding judge, the bill was dismissed. (13 Federal Reporter, 97.) An appeal was taken.

Charles Eginton, (*W. O. Dodd* with him,) for appellant.

John Mason Brown, (*Alexander P. Humphrey* and *George M. Davie*, with him,) for appellees.

MILLER, J. . . . The cases in which it has been held that a court of equity cannot enforce the levy and collection of taxes to pay the debts of municipal corporations began with *Walkley* v. *City of Muscatine*, 6 Wall. 481.

In that case, the complainant Walkley had procured judgments against the city of Muscatine for interest on bonds of the city, executions had been returned "*nulla bona*," the mayor and aldermen had refused to levy a tax for the payment of the judgments, and had used the annual tax for other purposes and paid nothing to plaintiff.

Walkley then filed his bill in equity praying a decree that the mayor and aldermen be compelled to levy a tax and appropriate so much of its proceeds as might be necessary to pay his judgments.

This court said, by Mr. Justice Nelson, that the remedy was by mandamus at law, and "we have been furnished with no authority

for the substitution of a bill in equity and injunction for the writ of mandamus," p. 483; and he adds, that "a court of equity is invoked as auxiliary to a court of law in the enforcement of its judgments only when the latter is inadequate to afford the proper remedy," pp. 483–4.

By inadequacy of the remedy at law is here meant, not that it fails to produce the money — that is a very usual result in the use of all remedies — but that in its nature or character it is not fitted or adapted to the end in view.

[The learned Judge then refers to *Rees* v. *Watertown*, 19 Wallace, 107, and other cases; and gives an extract from WAITE, C. J., in *Meriwether* v. *Garrett*, 102 U. S. 472, ending with the following sentence: "Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it."]

But though the question was not then decided, and it is urged upon us now, we see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes. A court of law possesses no power to levy taxes. Its power to compel officers who are lawfully appointed for that purpose, in a case where the duty to do so is clear, and is strictly ministerial, rests upon a ground very different from and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect such a tax.

In the one case the officers exist, the duty is plain, the plaintiff has a legal right to have these officers perform that duty for his benefit, and the remedy to compel this performance, namely, the writ of mandamus, has been a well known process in the hands of the courts of common law for ages. In the other there exists no officer authorized to levy the tax or to collect it when levied. The power to enforce collection when the tax is levied, or to cause it to be levied by existing officers, is a common-law power, strictly guarded and limited to cases of mere ministerial duty, and is not one of the powers of a court of chancery. It would require in this court, not the compulsory process against some existing officer to make him perform a recognized duty, but the appointment by the court of such an officer and a decree directing him what to do.

In the one case, his power proceeds from the law, and he is compelled to exercise it; in the other, it proceeds from the court which first makes its own decree, and makes an officer to enforce it. No such power has ever yet been exercised by a court of chancery. The appointment of its own officer to collect taxes levied by order of a common-law court is as much without authority, as to appoint the same officer to levy and collect the tax. They are parts of the same proceeding, and relate to the same matter. If the common-law court

can compel the *assessment* of a tax, it is quite as competent to enforce its *collection* as a court of chancery. Having jurisdiction to compel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity. Its sheriff or marshal is as well qualified to collect the tax as a receiver appointed by the court of chancery.

The difficulty is that no power exists in either court to fill the vacancy in the office of tax collector; and the case of *Lee County Supervisors* v. *Rogers*, 7 Wall. 175, where the laws of the State of Iowa expressly authorized the court to enforce its writ of mandamus by making such appointment, the only case in which it has ever been done, shows that without such legislative authority it cannot be done.

It is the duty of the marshals of the Federal courts and the sheriffs of State courts to levy executions issuing from these courts on the property of defendants, and sell it, to raise money to pay their judgments. Let us suppose that, for some reason or other, the office of marshal or sheriff became vacant for a while. Would that authorize the court of equity of the Federal or State government to appoint a sheriff or marshal ? or to appoint a receiver to levy the execution ? or, if it had been levied, to sell the property, collect the purchase-money, and pay it to plaintiff ? If this cannot be done, if it never has been done, why can it do a much more unjudicial act, by appointing a collector to collect the taxes, or, what is still less appropriate, appointing a receiver, and endow him with that power ?

To appoint a marshal or a sheriff to execute the process of a court to enforce the judgment of that court, is not such a wide departure from the judicial function as to appoint a receiver to collect taxes; but no case has been cited of the exercise of even the former power by the court, much less the appointment, by a court of chancery, of an officer to execute the processes of a court of law. The appointment of special masters or commissioners to make sales under decrees in chancery, is the ordinary mode of that court to enforce its decrees in cases where the court has jurisdiction of the subject matter of the suit.

Not only are the decisions here reviewed of our own court clearly opposed to the exercise of this power by the court of equity, but the decisions of the highest court of the State of Kentucky are equally emphatic. It is the powers derived from the statute law of that State under which alone this tax can be collected. The issue of the bonds on which the judgment was obtained was by virtue of a special statute, and that statute prescribed the mode of levying and collecting this tax.

It enacted that its collection should not be by the sheriff who collected the ordinary taxes for the State and county, but that a special tax collector should be appointed for that purpose by the justices of the County Court who levied the tax. The Court of Appeals, construing this statute, which was in existence when the bonds were issued, holds that no other officers but these can collect the taxes, and has decided, both in reference to this law and the Constitution of the State, that a

court of chancery cannot appoint such an officer or exercise this function of tax collector. *McLean County Precinct* v. *Deposit Bank*, 81 Ky. 254.

This decision, if not conclusive, is entitled to great weight as construing the statute under which alone this tax can be levied and collected.

These considerations require that the answers to each of the three questions certified to us by the judges of the Circuit Court be in the negative, and that the decree of that court dismissing the bill be

Affirmed.

HARLAN, J., dissenting. [After stating the case, and referring to various authorities relied on in the majority opinion.]

These cases only establish the doctrine that the levying of taxes is not a judicial function.

It seems to me that the granting of relief to Thompson will not, in any degree, disturb the principles announced in the foregoing cases. The bill does not ask the court to usurp the function of *levying* taxes. That duty has been performed by the only tribunal authorized to do it, viz., the County Court of Allen County. Nothing remains to be done, except to collect from individuals specific sums of money which they are under legal obligation to pay. The collections of these sums will not interfere with any discretion with which the Allen County Court is invested by law; for, by its own order, made in conformity with the law of the State, and by the judgment in the mandamus proceedings, the sums due from the individual defendants, and from other tax-payers, have been set apart for the payment of Thompson's judgments. Those sums, when collected, cannot be otherwise used. As the County Court cannot find any one who will accept the office of special collector, and as the parties agree that there is no mode of collecting the sums set apart in the hands of the individual defendants and other tax-payers, for the payment of Thompson, I am unable to perceive why the Circuit Court, sitting in equity, may not cause these sums to be applied in satisfaction of its judgments at law. The plaintiff has no remedy at law; for, the common-law court in rendering judgment has done all that it can do, and the local tribunal, by levying the required tax and seeking the aid of a special collector to collect it, has done all that it can do. There is no suggestion, or even pretence, that the tax-payers who are sued dispute the regularity of the assessment made against them by the County Court. Admitting their legal liability for the specific amounts assessed against them, and conceding that what they owe must, when paid, go in satisfaction of Thompson's judgments, they dispute the authority of any judicial tribunal to compel them to pay it over. With money in their hands, equitably belonging to the judgment creditor, they walk out of the court whose judgments remain unsatisfied, announcing, in effect, that they will hold negotiations only with a "special collector," who has no existence.

That the court below, sitting in equity — after it has given a judgment at law for money, and after a return of *nulla bona* against the debtor — may not lay hold of moneys set apart, *by the act of the debtor*, in the hands of individuals *exclusively for the payment of that judgment*, and which money, the parties agree, cannot be otherwise reached than by being brought into that court, under its orders, is a confession of helplessness on the part of the courts of the United States that I am unwilling to make. I, therefore, dissent from the opinion and judgment in this case.

MOUNT PLEASANT *v.* BECKWITH.

1879. 100 *U. S.* 514.[1]

Appeal from U. S. Circuit Court for Eastern District of Wisconsin.

Bill in equity by Beckwith against the town of Mount Pleasant, the town of Caledonia, and the city of Racine to enforce the payment of certain bonds.

In 1853 the town of Racine and each of the three above-named municipalities were distinct municipal corporations established by law. The bonds in suit were issued by the town of Racine, under authority of the legislature. In 1859 the name of the town of Racine was changed to Orwell. In 1860 the legislature passed an act vacating and extinguishing the town of Orwell (formerly the town of Racine), and enacting that thereafter it should have no existence as a body politic and corporate. This act of 1860 annexes part of the territory of Orwell to Caledonia, and the remainder to Mount Pleasant; but contains no provision relative to the payment of the existing indebtedness of Orwell. In 1871 an act was passed taking from Mount Pleasant a portion of the territory which had been thus annexed to it in 1860, and adding such territory to the city of Racine. This act of 1871 provides that the city of Racine "shall assume and pay so much of the indebtedness of the town of Racine as the lands described in the first section of the act may be or become legally chargeable with and liable to pay."

The court, upon the aforesaid facts and upon the report of a master stating the respective proportions and valuations of the taxable property received by each of the defendant municipalities from the town of Orwell, made a decree that the defendants should severally pay certain proportions of the debt due Beckwith. The decree was based on the theory that an equitable liability for the indebtedness of the town of Racine, *alias* Orwell, accrued against the defendant municipalities, to which such territory was distributed, in the proportion which the taxable property received by each and the valuation thereof bore to the whole taxable property and the whole debt of such vacated town.

[1] Statement abridged. Argument and part of opinion omitted. — Ed.

From this decree the town of Mount Pleasant and the town of Caledonia appealed.

L. S. Dixon and *John T. Fish*, for appellants.

Wm. P. Lynde, *contra.*

CLIFFORD, J. [After recapitulating the facts, and stating the power of the legislature over municipal corporations, and noting the fact that the city of Racine did not appeal from the decree below.] . . . The only question open in the case for examination is whether the other two respondent municipal corporations are liable to any extent for the debts of the extinguished municipality, portions of whose territory were transferred by the legislature into their respective jurisdictions. We say, liable to any extent, because the question of amount was submitted to the master, and the record shows that neither of the appellants excepted to the master's report. *Gordon* v. *Lewis*, 2 Sum. 143; *McMicken* v. *Perin*, 18 How. 507. Nor do either of the assignments of error allege that the master committed any error in that regard. *Brockett* v. *Brockett*, 3 id. 691.

Viewed in that light, as the case should be, it is clear that if the appellants are liable at all they are liable for the respective amounts specified in the decree. *Harding* v. *Handy*, 11 Wheat. 103; *Story* v. *Livingston*, 13 Pet. 359.

Where one town is by a legislative act merged in two others, it would doubtless be competent for the legislature to regulate the rights, duties, and obligations of the two towns whose limits are thus enlarged; but if that is not done, that it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. *Morgan* v. *Beloit, City and Town*, 7 Wall. 613, 617.

It is not the case where the legislature creates a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by her before the act of separation was passed. *Town of Depere and Others* v. *Town of Bellevue and Others*, 31 Wis. 120, 125.

Instead of that, it is the case where the charter of one corporation is vacated and rendered null, the whole of its territory being annexed to two others. In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation.

Speaking to the same point, the Supreme Court of Missouri held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the sub-

sisting corporation will be entitled to all the property and be answerable for all the liabilities. *Thompson* v. *Abbott*, 61 Mo. 176, 177.

Grant that, and it follows that when the corporation first named ceases to exist there is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness. Its property passes into the hands of its successor, and when the benefits are taken the burdens are assumed, the rule being that the successor who takes the benefits must take the same *cum onere*, and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens. *Swain* v. *Seamens*, 9 Wall. 254, 274; *Pickard* v. *Sears*, 6 Ad. & Ell. 474.

Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. Cooley, Const. Lim. (4th ed.) 232.

Municipal corporations, says Mr. Justice Field, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the State for the convenient administration of their affairs; but when authorized to take stock in a railroad company, and issue their obligations in payment of the stock, they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. *Broughton* v. *Pensacola*, 93 U. S. 266, 269.

Modifications of their boundaries may be made, or their names may be changed, or one may be merged in another, or it may be divided and the moieties of their territory may be annexed to others; but in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. *Colchester* v. *Seaber*, 3 Burr. 1866.

Neither argument nor authority is necessary to prove that a State legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted. Contracts under the Constitution are as sacred as the Constitution that protects them from infraction, and yet the defence in this case, if sustained, will establish the proposition that the effect of State legislation may be such as to deprive a party of all means of sustaining an action of any kind for their enforcement. Cases, doubtless, may arise when the party cannot collect what is due under the contract; but he ought always to be able by some proper action to reduce his contract to judgment.

Suppose it be admitted that the act of the State legislature annulling the charter of the municipality indebted to the complainant, without making any provision for the payment of outstanding indebtedness, was unconstitutional and void, still it must be admitted that the very act which annulled that charter annexed all the territory and property of the municipality to the two appellant towns, and that they acquired with that the same power of taxation over the residents and their estates that they previously possessed over the estates of the inhabitants resident within their limits before their boundaries were enlarged.

Extinguished municipal corporations neither own property, nor have they any power to levy taxes to pay debts. Whatever power the extinguished municipality had to levy taxes when the act passed annulling her charter terminated, and from the moment the annexation of her territory was made to the appellant towns, the power to tax the property transferred, and the inhabitants residing on it, became vested in the proper authorities of the towns to which the territory and jurisdiction were by that act transferred; from which it follows that for all practical purposes the complainant was left without judicial remedy to enforce the collection of the bonds or to recover judgment for the amounts they represent.

When the appellant towns accepted the annexation, their authorities knew, or ought to have known, that the extinguished municipality owed debts, and that the act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter of the old town would have the effect to discharge its indebtedness, or to impair the obligation of the contract held by its creditors to enforce the same against those holding the territory and jurisdiction by the authority from the legislature and the public property and the power of taxation previously held and enjoyed by the extinguished municipality.

Express provision was made by the act annulling the charter of the debtor municipality for annexing its territory to the appellant towns; and when the annexation became complete, the power of taxation previously vested in the inhabitants of the annexed territory as a separate municipality ceased to exist, whether to pay debts or for any other purpose, — the reason being that the power, so far as respected its future exercise, was transferred with the territory and the jurisdiction over its inhabitants to the appellant towns, as enlarged by the annexed territory; from which it follows, unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the Constitution forbids, that the appellant towns assumed each a proportionate share of the outstanding obligations of the debtor town when they acquired the territory, public property, and municipal jurisdiction over every thing belonging to the extinguished municipality.

Corporations of a municipal character, such as towns, are usually organized in this country by special acts or pursuant to some general State law; and it is clear that their powers and duties differ in some important

particulars from the towns which existed in the parent country before the Revolution, where they were created by special charters from the crown, and acquired many of their privileges by prescription, without any aid from Parliament. Corporate franchises of the kind granted during that period partook much more largely of the nature of private corporations than do the municipalities created in this country, and known as towns, cities, and counties. Power exists here in the legislature, not only to fix the boundaries of such a municipality when incorporated, but to enlarge or diminish the same subsequently, without the consent of the residents, by annexation or set-off, unless restrained by the Constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality.

Property set off or annexed may be benefited or burdened by the change, and the liability of the residents to taxation may be increased or diminished; but the question, in every case, is entirely within the control of the legislature, and, if no provision is made, every one must submit to the will of the State, as expressed through the legislative department. Inconvenience will be suffered by some, while others will be greatly benefited in that regard by the change. Nor is it any objection to the exercise of the power that the property annexed or set off will be subjected to increased taxation, or that the town from which it is taken or to which it is annexed will be benefited or prejudiced, unless the Constitution prohibits the change, since it is a matter, in the absence of constitutional restriction, which belongs wholly to the legislature to determine. Courts everywhere in this country hold that, in the division of towns, the legislature may apportion the burdens between the two, and may determine the proportion to be borne by each. *Sill* v. *The Village of Corning*, 15 N. Y. 297; *Mayor* v. *State, ex rel. of the Board of Police of Baltimore*, 15 Md. 376; *City of Olney* v. *Harvey*, 50 Ill. 453; *Borough of Dunmore's Appeal*, 52 Pa. St. 374.

Public property and the subordinate rights of a municipal corporation are within the control of the legislature; and it is held to be settled law that, where two separate towns are created out of one, each, in the absence of any statutory regulation, is entitled to hold in severalty the public property of the old corporation which falls within its limits. *North Hempsted* v. *Hempsted*, 2 Wend. (N. Y.) 109; *The Hartford Bridge Company* v. *East Hartford*, 16 Conn. 149, 171.

Extensive powers in that regard are doubtless possessed by the legislature; but the Constitution provides that no State shall pass any "law impairing the obligation of contracts," from which it follows that the legislature, in the exercise of any such power, cannot pass any valid law impairing the right of existing creditors of the old municipality. 1 Dillon, Municipal Corp. (2d ed.), sect. 41; *Van Hoffman* v. *City of Quincy*, 4 Wall. 535, 554; *Lee County* v. *Rogers*, 7 id. 181, 184; *Butz* v. *City of Muscatine*, 8 id. 575, 583; *Furman* v. *Nichol*, id. 44, 62.

Where a municipal corporation has the power to contract a debt, it has, says Dixon, C. J., by necessary implication, authority to resort to

the usual mode of raising money to pay it, which undoubtedly is taxation. *State ex rel. Hasbrouck* v. *The City of Milwaukee*, 25 Wis. 122, 133.

Whenever the charter of a city, at the time of the issue of bonds, made it the duty of the city authorities to levy and collect the amount, when reduced to judgment, like other city charges, the same court held that a subsequent act of the legislature prohibiting the city from levying such a tax would be repugnant to the Constitution. *Soutter* v. *The City of Madison*, 15 id. 30.

State control over the division of the territory of the State into cities, towns, and districts, unless restricted by some constitutional limitation, is supreme, but the same court admits that it cannot be exercised to annul another regulation of the Constitution. *Chandler* v. *Boston*, 112 Mass. 200; 6 Cush. (Mass.) 580.

Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as are private persons, nor is it in the power of the legislature to authorize them to violate their contracts. *The Western Saving Fund Society* v. *The City of Philadelphia*, 31 Pa. St. 175, 185.

Text-writers concede almost unlimited power to the State legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. 1 Dillon, Municipal Corp., sect. 128; *Blanchard* v. *Bissell*, 11 Ohio St. 96; *Lansing* v. *County Treasurer*, 1 Dill. 522, 528.

Concessions of power to municipal corporations are of high importance; but they are not contracts, and consequently are subject to legislative control without limitation, unless the legislature oversteps the limits of the Constitution. *Layton* v. *New Orleans*, 12 La. Ann. 515.

Bonds having been issued and used by a city for purchasing land for a park, which was pledged for the payment of the bonds, held, that a subsequent act of the legislature authorizing a sale of a portion of the park, free of all liens existing by virtue of the original act, was in violation of the Federal Constitution, as impairing the obligation of contracts. *Brooklyn Park Com.* v. *Armstrong*, 45 N. Y. 234, 247.

Laws passed by a State impairing the obligation of a contract are void, and if a State cannot pass such a law, it follows that no agency can do so which acts under the State with delegated authority. Cooley, Const. Lim. (4th ed.) 241; Angell & Ames on Corp. (9th ed.), sects. 332, 333.

Municipal debts cannot be paid by an act of the legislature annulling the charter of the municipality, and, if not, then the creditors of such a political division must have some remedy after the annulment takes place. Without officers, or the power of electing such agents, a municipal corporation, if it can be so called, would be an entity very difficult

to be subjected to judicial process or to legal responsibility; but when the entity itself is extinguished, and the inhabitants with its territory and other property are transferred to other municipalities, the suggestion that creditors may pursue their remedy against the original contracting party is little less than a mockery. Public property, with the inhabitants and their estates, and the power of taxation, having been transferred by the authority of the legislature to the appellants, the principles of equity and good conscience require that inasmuch as they are, and have been for nearly twenty years, in the enjoyment of the benefits resulting from the annexation, they shall in due proportions also bear the burdens. *New Orleans* v. *Clark*, 95 U. S. 644, 654.

Equitable rules of decision are sufficiently comprehensive in their reach to do justice between parties litigant, and to overcome every difficulty which can be suggested in this case. States are divided and subdivided into such municipalities, called counties, cities, towns, and school districts, and the legislature of every State is required every year to pass laws modifying their charters and enlarging or diminishing their boundaries. Nor are the questions presented in this case either new in principle or difficult of application. New forms are given to such charters in every day's experience, when the limits of an old corporation are changed by annexation of new territory, or portions of the territory of the old municipality are set off and annexed to another town. Both corporations, in such a case continue, though it may be that the charters are much changed, and that the inhabitants of the territory annexed or set off fall under different officers and new and very diverse regulations. *Beckwith* v. *City of Racine*, 7 Biss. 142, 149.

Pecuniary burdens may be increased or diminished by the change; but, in the absence of express provisions regulating the subject, it will be presumed in every case where both municipalities are continued, that the outstanding liabilities of the same remain unaffected by such legislation. Unlike that in this case, the charter of the old town was vacated and annulled, from which it follows that the same principles of justice require that the appellant towns, to which the territory, property, and inhabitants of the annulled municipality were annexed, should become liable for its outstanding indebtedness. *Decree affirmed.*

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BRADLEY, dissenting.

I am of opinion that it requires legislation to make a legal obligation against the new town, and make the apportionment of the debt; and I dissent on that ground from the judgment and opinion of the court in this case.

BREWIS *v.* CITY OF DULUTH AND VILLAGE OF DULUTH.

1881. 3 *McCrary U. S. Circuit Court Reports*, 219.

U. S. CIRCUIT COURT for District of Minnesota.

In equity. Demurrer to bill of complaint.

This suit is brought against the city of Duluth and the village of Duluth to recover the coupons overdue upon bonds of the City of Duluth, in this district. A demurrer is interposed by the village of Duluth.

Gilman & Clough, for demurrer.

Williams & Davidson, *contra*.

NELSON, District Judge. The complainant is the owner of certain bonds issued under an act of the legislature of Minnesota, approved March 8, 1873, authorizing the city of Duluth to fund the debt previously incurred for improving the harbor, and for other purposes. The bonds were payable in not less than 20 nor more than 30 years from the date of their issue, and bear interest at the rate of 7 per cent. per annum, payable semi-annually in the city of New York. The complainant became a *bona fide* holder of the bonds and coupons previous to 1875.

It appears that on February 23, 1877, the legislature of the state of Minnesota created the village of Duluth out of a part of the territory of the city of Duluth, under an act entitled "An act to create the village of Duluth, * * * and to apportion the debts of the city of Duluth between itself and the village of Duluth, and provide for the payment thereof."

This act carved the village out of the city limits, taking and embracing in the village all the business part of the city and business houses, the harbor, railroad depots and tracks, nearly all the dwelling-houses, all the population except about 100 inhabitants, and nineteen-twentieths of all the taxable property; and no provision was made for the payment of the debts of the city by the village unless creditors would accede to the terms imposed by the legislature as hereinafter stated. It also appears that on February 28, 1877, an act was passed entitled "An act to amend the act entitled an act to incorporate the city of Duluth," approved March 5, 1870, and this act declared that the service of all summons and process in suits against the city of Duluth should be made on the mayor of the city, and that service made on any other officer should not be valid against the city. It also provided that the term of the office of mayor should cease on the following April, 1877, and no provision was made for the election of a successor or for filling a vacancy; that no taxes should be levied without the affirmative vote of all, to-wit, four aldermen; and since the passage of the act there have never been four aldermen in the city qualified to act. There is a section authorizing the levy of taxes by the county of St. Louis, in which the city is situated, but all taxes thus levied and collected must be paid to the village of Duluth.

On the facts admitted by the demurrer the complainant is entitled to relief. The legislature undoubtedly had the right to create the village of Duluth out of the territory of the city, and, as between the city and the village, apportion the existing indebtedness; but when the corporation which created the debt is shorn of its population and taxable property to such an extent that there is no reasonable expectation of its meeting the present indebtedness, and it is unable so to do, the creditors, at least, can enforce a proportionate share of their obligations against the two corporations carved out of one. Both are liable to the extent of the property set off to each respectively.

The debt of the city at the time the village was created by act of February 23, 1877, was about $400,000, and the act creating the village of Duluth authorized an apportionment of the debts as follows:

Section 3, in substance, provides that after one year from February 23, 1877, the village shall become jointly liable with the city on all bonds issued prior to the passage of this act, unless it shall within the year take up and cancel, as hereinafter provided, $218,000 of the evidence of indebtedness outstanding of the city, provided that interest to January 1, 1878, on all bonds and maturing coupons shall be treated and regarded as part of said evidence of outstanding indebtedness.

Section 4 enacts that not more than $100,000 of village 6 per cent. 30-year bonds shall be issued for taking up outstanding bonds and orders of the city of Duluth to the amount of $218,000, and interest thereon to January 1, 1870. These bonds are to be placed in the possession of the judge of the Eleventh judicial district of the state of Minnesota.

Section 5 enacts that persons holding bonds, matured coupons, or orders of the city of Duluth prior to the passage of this act may surrender the same to the judge of the district court for exchange for the bonds of the village of Duluth; and whenever $218,000 has been surrendered, the judge shall issue to the persons so surrendering, the bonds of the village of Duluth to one-fourth of the amount so surrendered, and on the delivery of the village bonds shall cancel the amount of city bonds received in exchange.

Other sections provide for annexation of more land from the city limits.

This statute interferes with the rights of creditors. The obligations of a municipal corporation are not affected, although the name may be changed and the territory increased or diminished, if the new organization embraces substantially the same territory and the same inhabitants. It may be true that generally creditors, to obtain relief, must look exclusively to the corporation creating the debt; but when a state of facts exists as disclosed here, and the old corporation is diminished in population, wealth, and territory to the extent admitted, it would be a mockery of justice to withhold the relief asked.

Without at this time considering more fully the question presented, whether the several acts of February 25, 1877, and February 28, 1878, impair the obligations of the contract between the city of Duluth and its creditors, it is clear to my mind that the bill on its face contains sufficient equity and calls for an answer.

The demurrer is overruled, and the defendant can have until January rule-day to answer.

McCrary, *Circuit Judge*, concurred.[1]

MERIWETHER *v.* GARRETT.

1880. 102 *U. S.* 472.[2]

Appeal from U. S. Circuit Court for Western District of Tennessee.

In Equity. The original bill was filed against the city of Memphis, Jan. 28, 1879, by Garrett *et als.;* alleging, in substance, that the plaintiffs are holders of overdue bonds and coupons of the city, upon much of which indebtedness they had secured judgments and writs of *mandamus* to compel the collection thereof; but that the city and its officials have for years failed to collect the taxes assessed. The bill prays for the appointment of a receiver, under the act of March 19, 1877, to take charge of the city assets, including bills for past due taxes, and to collect all outstanding claims due to the city, and to settle the debts of the city.

By an act passed Jan. 29, 1879, and approved Jan. 31, 1879, the legislature repealed certain specifically named acts incorporating Memphis and amending its charter. The act of 1879 also provides that the charters of all municipal corporations in this State having a population of 35,000, or over, (which Memphis had) "be and the same are hereby repealed, and all municipal offices held thereunder are abolished." The said act further provided that "the population within the territorial limits as now defined, and the territory of all municipal corporations heretofore governed" under certain specified statutes (which are hereby repealed) "are hereby resolved back into the body of the State, and

[1] Upon the final hearing, at June term, 1882, the court, from evidence given, found that the city of Duluth "is now in a condition to meet its matured obligations, and, prospectively, all others as they mature." The court said that the taxable property in the city "has already increased nearly or quite fourfold, and is advancing rapidly." "There is, therefore, no legal or equitable reason, in the light of authority, for going behind the legislative apportionment." The court reaffirmed the intrinsic correctness of the view taken in the above opinion given upon the demurrer, but said: "The case, as now before the court, is very different from that presented on demurrer." The bill was dismissed. 13 Fed. Rep. 334. — Ed.

[2] The statement is abridged, adopting largely the condensed statement in the opinion of Field, J., p. 502–510. The dissenting opinion of Strong, J., is omitted; also portions of the opinion of Field, J. — Ed.

all offices held under and by virtue of said repealed sections are hereby abolished; and all power of taxation, in any form whatever, heretofore vested in or exercised by the authorities of said municipal corporations by virtue of any of the acts of incorporation hereinbefore recited, or otherwise, is for ever withdrawn and reserved to the legislature; and the public buildings, squares, promenades, wharves, streets, alleys, parks, fire-engines, hose and carriages, horses and wagons, engine-houses, engineer instruments, and all other property, real and personal, hitherto used by such corporations for municipal purposes, are hereby transferred to the custody and control of the State, to remain public property, as it has always been, for the uses to which said property has been hitherto applied. And no person holding office under and by virtue of any of said repealed sections, or any of the acts above recited, shall, from and after the passage of this act, exercise or attempt to exercise any of the powers or functions of said office.

On the same day with the passage of the repealing act, the legislature passed another act to establish taxing districts in the State, and to provide the means for their local government. It declared that the several communities embraced in the territorial limits of the repealed corporations, and of such other corporations as might surrender their charters under the act, were created taxing districts in order to provide the means of local government for their peace, safety, and general welfare; that the necessary taxes for the support of the governments thus established should be imposed directly by the General Assembly, and not otherwise; that in administering the affairs and providing the means of local government the following agencies and instrumentalities were established, — namely, a board of fire and police commissioners; a committee on ordinances or local laws, to be known as the legislative council of the taxing district; a board of health, and a board of public works; and it prescribed in detail the duties and powers of these local agencies. The act prohibited the commissioners from issuing any bonds, notes, scrip, or other evidences of indebtedness, or from contracting for work, material, or services in excess of the amount levied for them for that year; and declared that no property, real or personal, held by them for public use should ever be subject to execution, attachment, or seizure under any legal process for any debt created by them; that all taxes due, or moneys in the hands of the county trustee, or on deposit, should be exempt from seizure under attachment, execution, garnishment, or other legal process. It also declared that no writ of *mandamus* or other process should lie to compel them or other governing agencies to levy any taxes, and that neither the commissioners, nor trustee, nor the local government should be held to pay or be liable for any debt created by the extinct corporations, and that none of the taxes collected under the act should ever be used for the payment of any of said debts. The act also declared that all the property previously used by the corporations for purposes of government was transferred to the custody and control of the board of commissioners of the taxing dis-

tricts, to remain public property for the uses to which it had previously been applied, and that all indebtedness for taxes or otherwise, whether in litigation or not, due to the extinct municipalities, should vest in and become the property of the State, to be disposed of for the settlement of their debts as should thereafter be provided by law.

In February, 1879, the plaintiffs filed an amended and supplemental bill, making certain officials co-defendants, and alleging that the above acts of Jan. 31, 1879, were unconstitutional. Bills were also filed by other judgment creditors. Feb. 12, 1879, the court ordered that the several causes be consolidated, and appointed Latham receiver. The order directs the receiver (*inter alia*) to take possession of all the real and personal property of the city, except certain property used for public purposes; to collect rents from city property; and to collect unpaid taxes.

March 14, 1879, the legislature passed an act, providing, as to the municipal corporations whose charters may have been repealed, that the governor "shall appoint an officer for such extinct corporations respectively, to be known as a receiver and back-tax collector." The act required said officer to take possession of all books, papers, and documents pertaining to the assessment and collection of taxes, which had been levied at the time of the repeal of the charters. It ordered him to file a bill in the Chancery Court of the county in which the corporation was situated, in the name of the State, in behalf of all creditors against all its delinquent tax-payers, and provided that taxes assessed prior to 1875 might be settled in the valid indebtedness of the extinct municipality, whether due or not, and that the receiver should receive evidences of such indebtedness at certain designated rates. It also prohibited him from coercing payment of a greater sum than one-fifth of the taxes in arrears annually, so as to distribute the whole through five equal annual instalments, commencing from his appointment and qualification. It authorized the Chancery Court to enforce all liens upon property for the payment of taxes, and to order all sales necessary for their collection; and to settle and adjust all equities, priorities, and liens; and to give to the defendants and creditors all the relief which might be given if there were as many separate suits as there were creditors and delinquent tax-payers. It provided that the taxes as collected should be paid into the State treasury, and be paid out to parties entitled to receive them, as adjudged by the Chancery Court, upon the warrant of the receiver, countersigned by the Chancellor. It required the receiver, in paying the money collected into the treasury, to distinguish the sources whence it was derived, showing the amount from each special and general tax, so that they might be kept separate, and be paid out to creditors according to the priority, lien, or equity determined. The act was accompanied with a proviso that it should not interfere with any vested rights entitling parties to a speedy collection.

Under this act, Meriwether was appointed by the governor receiver

and the back-tax collector of Memphis. The plaintiffs subsequently amended their bill by making Meriwether a defendant.

To the bill, as consolidated and amended, the defendants demurred. Upon this demurrer several questions arose, on which the judges of the Circuit Court were divided in opinion. The prevailing opinion of the presiding judge being against the demurrer, it was overruled. Judgment was rendered in favor of plaintiffs. The decree adjudged that Latham, the receiver, should proceed to collect the assets and property of the city (including back-taxes) in the manner directed by the previous order of the court. It also enjoined Meriwether from attempting to collect or interfere with the assets in the possession of the said receiver. And the decree further adjudged that all the property within the limits of the territory of the city of Memphis was liable and might be subjected to the payment of all the debts of the city, and that such liability would be enforced thereafter, from time to time, in such manner as the court might direct.

From the decree the defendant appealed.

Joseph B. Heiskell, *George Davitt*, and *Minor Meriwether*, for appellants.

William M. Randolph, *contra*.

Mr. Chief Justice Waite announced the conclusions reached by the court as follows: —

1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn.

2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted.

3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.

4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief. Whether taxes levied in obedience to contract

obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it.

5. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit or in any other way authorized by law, and to apply the proceeds upon the judgments.

6. The bills in this case cannot be amended so as to obtain relief against the receiver and back-tax collector, without making an entirely new suit. They were not framed with a view to any such purpose.

7. The decree of the court below is reversed.

8. The cause is remanded, with instructions to dismiss the bills, without prejudice. If, on the settlement of the accounts of the receiver herein, it shall be found he has any money in his hands collected on taxes levied under judicial direction to pay judgments in favor of any persons who have become parties to this suit, an order may be made directing its appropriation to the payment of such judgment.

Upon the first, second, third, and fifth of these propositions the judgment of the court is unanimous. Upon the fourth, sixth, seventh, and eighth it is by a majority only.

Mr. Justice Field. Mr. Justice Miller, Mr. Justice Bradley, and myself concur in the judgment rendered, but, as the judgment is not accompanied by a statement of the reasons on which it is founded, I proceed to state those which have controlled us.

[After stating the case.]

This decree is manifestly erroneous in its main provisions. It proceeds upon the theory that the property of every description held by the municipality at the time of its extinction, whether held in its own right or for public uses, including also in that designation its uncollected taxes, were chargeable with the payment of its debts, and constituted a trust fund, of which the Circuit Court would take possession and enforce the trust; and that the private property of the inhabitants of the city was also liable, and could be subjected by the Circuit Court to the payment of its debts. In both particulars the theory is radically wrong.

The right of the State to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be

enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers. There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. *United States* v. *Railroad Co.*, 17 Wall. 322; *Commissioners* v. *Lucas, Treasurer*, 93 U. S. 108; *People* v. *Morris*, 13 Wend. (N. Y.) 325; *Philadelphia* v. *Fox*, 64 Pa. St. 169; *Montpelier* v. *East Montpelier*, 29 Vt. 12; Angell & Ames, Corp. (10th ed.), sect. 31; Dill. Mun. Corp., sect. 30; Cooley, Const. Lim. 192, 193. By the repeal the legislative powers previously possessed by the corporation of Memphis reverted to the State. A portion of them the State immediately vested in the new government of the taxing district, with many restrictions on the creation of indebtedness. A portion of them the State retained; it reserved to the legislature all power of taxation. It thus provided against future claims from the improvidence or recklessness of the new government. The power of the State to make this change of local government is incontrovertible. Its subsequent provision for the collection of the taxes of the corporation levied before the repeal of its charter, and the appropriation of the proceeds to the payment of its debts, remove from the measure any imputation that it was designed to enable the city to escape from its just liabilities.

But while the charter of a municipal corporation may be repealed at the pleasure of the legislature, where there is no inhibition to its action in the Constitution of the State, the lawful contracts of the corporation, made whilst it was in existence, may be subsequently enforced against property held by it, in its own right, as hereafter described, at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must, upon his decease, go to the satisfaction of his debts before those who succeed to his rights can share in its distribution.

. . . . . .

[As to the language used in *Broughton* v. *Pensacola*, 93 U. S. 266, p. 268.] It means that whatever property a municipal corporation holds subject to the payment of its debts, will, after its dissolution, be so administered and applied by a court of equity.

. . . . . .

What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State. In its streets, wharves,

cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property passes under the immediate control of the State, the agency of the corporation then ceasing. 2 Dillon, Mun. Corp., sects. 445, 446; *Schaffer* v. *Cadwallader*, 36 Pa. St. 126; *City of Davenport* v. *Peoria Marine & Fire Insurance Co.*, 17 Iowa, 276; *Askins* v. *Commonwealth*, 1 Duv. (Ky.) 275; *The President, &c.* v. *City of Indianapolis*, 12 Ind. 620.

In the third place, we say that taxes previously levied, but not collected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation. Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the tax-payer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States — and we believe in Tennessee — an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *City of Augusta* v. *North*, 57 Me. 392; *City of Camden* v. *Allen*, 2 Dutch. (N. J.) 398; *Perry* v. *Washburn*, 20 Cal. 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of *mandamus* only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute. *Philadelphia* v. *Greble*, 38 Pa. St. 339; *Howell* v. *Philadelphia*, id. 471; 2 Dillon, Mun. Corp., sect. 659. Levied only by authority of the legislature, they can be altered, postponed, or released at its pleasure. A repeal of the law, under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing act, though the tax may be revived and enforced by subsequent legislation. We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract. It is

not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected, — being mere imposts of the government, created and continuing only by the will of the legislature, — have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation. They are only the means provided for obtaining funds to support its government and pay its debts, and disappear as such means with the revocation of the charter, except as the legislature may otherwise provide. When they are collected, the moneys in the hands of the collecting officer may be controlled by the process of the courts, and applied by their direction to the uses for which the taxes were levied; but until then there is nothing in existence but a law of the State imposing certain charges upon persons or property, which the legislature may change, postpone, or release, at any time before they are enforced. So long as the law authorizing the tax continues in force, the courts may, by *mandamus*, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.

It is the province of the courts to decide causes between parties, and, in so doing, to construe the Constitution and the statutes of the United States, and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration.

[After referring to *Rees* v. *Watertown*, 19 Wallace, 107, 116; and

Heine v. *Levee Com'rs of New Orleans*, 1 Woods, 247, and 19 Wallace, 655.] These authorities — and many others to the same purport might be cited — are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it.

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by *mandamus* against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the legislature, which alone can give them relief. No Federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal court, it cannot seize the power which belongs to the legislative department of the State and wield it in their behalf.

To return to the question propounded: what is the property of a municipal corporation which, on its dissolution, the courts can reach and apply to the payment of its debts?

We answer, it is the private property of the corporation, that is, such as it held in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose. In this respect the position of the extinct corporation is not dissimilar to that of a deceased individual; it is only such property as is possessed, freed from any trust, general or special, which can go in liquidation of debts.

The decree of the Circuit Court proceeding upon a different theory of its control over the uncollected taxes of the repealed corporation, and of the property which could be applied to the payment of its debts, cannot be maintained.

On another ground, also, the decree is equally untenable. It adjudges that "all the property within the limits of the territory of the city of Memphis is liable, and may be subjected to the payment of all the debts" for which the suits are brought, and that "such liability shall be enforced thereafter, from time to time, in such manner" as the court may direct.

In no State of the Union, outside of New England, does the doctrine obtain that the private property of individuals within the limits of a municipal corporation can be reached by its creditors, and subjected to the payment of their demands. In Massachusetts and Connecticut, and perhaps in other States in New England, the individual liability of the

inhabitants of towns, parishes, and cities, for the debts of the latter, is maintained, and executions upon judgments issued against them can be enforced against the private property of the inhabitants. But this doctrine is admitted by the courts of those States to be peculiar to their jurisprudence, and an exception to the rule elsewhere prevailing. Elsewhere the private property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation; but taxes, as we have already said, can only be levied by legislative authority. The power of taxation is not one of the functions of the judiciary; and whatever authority the States may, under their constitutions, confer upon special tribunals of their own, the Federal courts cannot by reason of it take any additional powers which are not judicial.

[After quoting from *Rees* v. *Watertown*, 19 Wallace, 107, p. 122.]

It is pressed upon us with great earnestness by counsel, that unless the Federal courts come to the aid of the creditors of Memphis, and enforce, through their own officers, the taxes levied before the repeal of its charter, they will be remediless. But the conclusion does not follow. The taxes levied pursuant to writs of *mandamus* issued by the Circuit Court are still to be collected, the agency only for their collection being changed. The receiver appointed by the governor has taken the place of the collecting officers of the city. The funds received by him upon the special taxes thus levied cannot be appropriated to any other uses. The receiver, and any other agent of the State for the collection, can be compelled by the court, equally as the former collecting officers of the city, to proceed with the collection of such taxes by the sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments. If relief is not thus afforded to the creditors, they must appeal to the legislature. We cannot presume that the appeal will be in vain. We cannot say that on a proper representation they will not receive favorable action.

It is certainly of the highest importance to the people of every State that it should make provision, not merely for the payment of its own indebtedness, but for the payment of the indebtedness of its different municipalities. Hesitation to do this is weakness; refusal to do it is dishonor. Infidelity to engagements causes loss of character to the individual; it entails reproach upon the State.

The Federal judiciary has never failed, so far as it was in its power, to compel the performance of all lawful contracts, whether of the individual, or of the municipality, or of the State. It has unhesitatingly brushed aside all legislation of the State impairing their obligation. When a tax has been authorized by law to meet them, it has compelled the officers of assessment to proceed and levy the tax, and the officers of collection to proceed and collect it, and apply the proceeds. In some instances, where the tax was the inducement and consideration of the contract, all attempts at its repeal have been held invalid. But this has been the limit of its power. It cannot make laws when the State

refuses to pass them. It is itself but the servant of the law. If the State will not levy a tax, or provide for one, the Federal judiciary cannot assume the legislative power of the State and proceed to levy the tax. If the State has provided incompetent officers of collection, the Federal judiciary cannot remove them and put others more competent in their place. If the State appoints no officers of collection, the Federal judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of State legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the legislative department of the State.

[Mr. Justice Strong, with whom concurred Mr. Justice Swayne and Mr. Justice Harlan, delivered an opinion dissenting from the action of the majority of the court in reversing the decree of the court below and ordering a dismissal of the complainants' bill.

One of his positions was, that the levy of a tax is a very distinct thing from the collection of a tax already levied. The levy is generally a legislative or a quasi-judicial act. The collection of a tax after it has been levied is a ministerial act, which a court has power to enforce.

His opinion concludes thus:

I think the decree should be modified by striking out so much of it as subjects to the payment of the debts of the city the property held exclusively for public uses, and so much as subjects to such payment the private property of all persons within the city's territorial limits.

Thus modified, I think the decree should be affirmed.][1]

MOBILE *v.* WATSON.

MOBILE *v.* UNITED STATES, ex rel. WATSON.

1886. 116 *U. S.* 289.[2]

Error to U. S. Circuit Court for Southern District of Alabama.

The object of the first of these suits was the recovery of a judgment for money, and of the second the enforcement, by the writ of mandamus, of the judgment recovered in the first. They were argued as one

[1] In *Luehrman* v. *Taxing District of Shelby County*, A. D. 1879, 2 Lea, Tenn. 425, a majority of the Supreme Court of Tennessee *held*, that the charter of Memphis had been constitutionally repealed, and also that the establishment of the Taxing District was constitutional. In *O'Connor* v. *Memphis*, A. D. 1881, 6 Lea, Tenn. 730, (where *scire facias* was issued requiring the Taxing District of Shelby County to show cause why the suit should not be revived against it,) a majority of the Supreme Court of Tennessee *held*, "that the Taxing District of Shelby County is so far the successor of the late corporation of the city of Memphis, or the same corporation under a new name, that a suit pending against the old corporation may be revived against the new, and prosecuted to judgment." The court did not decide as to the creditor's remedy for collecting his judgment. — Ed.

[2] Statement abridged. Argument and part of opinion omitted. — Ed.

case. In the first case Henry Watson, the defendant in error, was the plaintiff in the Circuit Court. He brought his action against the Port of Mobile to recover the principal money due on certain bonds issued by the City of Mobile, under its corporate name. . . .

. . . . . .

By the act of 1859, the City of Mobile was authorized to issue bonds to aid in the construction of a railroad under such contract as the City might make with the railroad company, and was vested with power to adopt the ordinances necessary to carry out such contract. The City thereafter contracted with the railroad company to issue the bonds of the City, and to annually provide a certain sum to be applied to the payment thereof by a special tax; and to pass an ordinance to accomplish this result. The City did accordingly pass an ordinance providing for the annual levy and collection of such a special tax. The bonds now held by Watson were issued to the railroad company, and sold by it, upon the faith of the act of the legislature and the aforesaid contract and ordinance of the City of Mobile.

In 1879 the legislature repealed the charter of the City of Mobile; and on the same day passed an act incorporating the Port of Mobile. All the territory included in the Port of Mobile was embraced within the limits of the City of Mobile. The area of the City comprised about 17 square miles; and that of the Port about 8 square miles. All the thickly settled part of the City was included in the Port; the excluded portion consisting of sparsely settled suburbs of little value. Fourteen-fifteenths of the inhabitants of the City were inhabitants of the Port. Out of more than $16,000,000 of taxable property of the City, all but $900,000 was included within the limits of the Port.

The act repealing the charter of the City provided for the appointment of commissioners, to whom the City property and claims should be turned over; and who should apply the proceeds of such assets to the payment of debts of the City, the floating debt to be paid first. The act expressly declared that the commissioners should have no power to levy any tax. By a subsequent act the commissioners of the City were required to turn over to the officials of the Port all the real and personal property formerly held by the City "for public use and governmental purposes," except only the wharves. It was not pretended that payment could or would be made to the bondholders out of the assets of the City in the hands of the commissioners. The act incorporating the Port of Mobile provided for a Police Board, empowered to levy and collect taxes to a limited amount, for the purpose of defraying the expenses of carrying out the provisions of the act. By a subsequent act it was expressly provided that the Police Board should not levy any other tax than the one authorized by the preceding act.

Plaintiff, Watson, recovered judgment against the Port of Mobile. Execution was issued, and returned "no property found." Watson then filed a petition, praying for a writ of mandamus, to compel the

Port of Mobile and its officers charged with the levying and collection of taxes to assess, levy, and collect a special tax for the payment of the judgment.

The court ordered the writ to issue against the Port of Mobile and the Police Board.

The original judgment against the Port of Mobile, and the judgment rendered upon the petition for mandamus, were both brought up for review by the writ of error sued out by the Port of Mobile.

Hannis Taylor and *J. Little Smith* (*Braxton Bragg* with them), for plaintiff in error.

Gaylord B. Clark and *James E. Webb,* for defendants in error.

Woods, J. [After stating the case.] We are of opinion, upon this state of the statutes and facts, that the Port of Mobile is the legal successor of the City of Mobile, and liable for its debts. The two corporations were composed of substantially the same community, included within their limits substantially the same taxable property, and were organized for the same general purposes.

Where the legislature of a State has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new. In illustration and support of this proposition, the following cases are in point:

In *Girard* v. *Philadelphia*, 7 Wall. 1, it was held by this court that the annexation to the City of Philadelphia, having a territory of only two square miles, of twenty-eight other municipalities with all their inhabitants, comprising districts, boroughs, and townships of various territorial extent, and the changing of its name, did not destroy its identity or impair its right to hold property devised to it.

So in *Broughton* v. *Pensacola*, 93 U. S. 266, 270, it was said by Mr. Justice Field, in delivering judgment, that when "a new form is given to an old corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabili-

ties as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization."

In *O'Connor* v. *Memphis*, 6 Lea, 730, the Supreme Court of Tennessee went so far as to say that — "Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these combined, will destroy the identity, continuity, or succession of the corporation if the people and territory reincorporated constitute an integral part of the corporation abolished. . . . The corporators and the territory are the essential constituents of the corporation, and its rights and liabilities naturally adhere to them."

In *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, a municipal corporation had been dissolved and its territory divided between and annexed to three adjacent corporations. Upon this state of facts the court held that, unless the legislature otherwise provided, the corporations to which the territory and the inhabitants of the divided corporation had been transferred, were severally liable for their proportionate share of its debts, and were vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing therein. See also *Colchester* v. *Seaber*, 3 Burrow, 1866; *Cuddon* v. *Eastwick*, 1 Salk. 192; *People* v. *Morris*, 13 Wend. 325; *New Orleans Railroad Co.* v. *City of New Orleans*, 26 La. Ann. 478.

[After referring to *Amy* v. *Selma*, recently decided by the Supreme Court of Alabama.]

This construction of these statutes of the State of Alabama by its highest court being in accord with our own views, and in harmony with former decisions of this court on the same general subject, is decisive of the question in hand, unless there is some material difference between the legislation concerning the City of Selma and that concerning the City of Mobile. The only difference that can be supposed to have any bearing upon the question under discussion is, that the act incorporating Selma embraced the same territory as that covered by the City of Selma, whereas the Port of Mobile covered little more than half the territory embraced by the City of Mobile. We think this difference between the two cases is an immaterial one. The Supreme Court of Alabama, in the case of the *Mobile and Spring Hill Railroad Co.* v. *Kennerly*, 74 Ala. 566, assumed that the City of Mobile and the Port of Mobile had substantially the same corporators and the same boundaries. And we are of opinion that the exclusion from the limits of the Port of Mobile of the sparsely settled suburbs of the City of Mobile, a territory of little value, as fairly appears by the record, and consisting, as stated by the counsel for plaintiff, without contradiction, largely of fields, swamps and land covered with water, will not serve to distinguish this case from the case of *Amy* v. *Selma*. We repeat, therefore, that in our judgment the Port of Mobile is the legal successor of the City of Mobile, and bound for its debts.

It follows from this proposition that the remedies necessary to the collection of his debt, which the law gave the creditor of the City of Mobile, remain in force against the Port of Mobile. The laws which establish local municipal corporations cannot be altered or repealed so as to invade the constitutional rights of creditors. So far as such corporations are invested with subordinate legislative powers for local purposes, they are the mere instrumentalities of the States, for the convenient administration of their affairs, and are subject to legislative control. But when empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals. *Broughton* v. *Pensacola*, 93 U. S. 266; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514.

Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void. *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Edwards* v. *Kearzey*, 96 U. S. 595; *Ralls County Court* v. *United States*, 105 U. S. 733; *Louisiana* v. *Pillsbury*, 105 U. S. 278; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285. These propositions receive strong support from the decisions of the Supreme Court of Alabama. *Commissioners of Limestone County* v. *Rather*, 48 Ala. 433; *Edwards* v. *Williamson*, 70 Ala. 145; *Slaughter* v. *Mobile County*, 73 Ala. 134.

It follows that the contract by which, under authority of the legislature, the City of Mobile agreed to levy a special tax for the payment of the principal and interest of the class of bonds to which those held by the plaintiff belong is still in force, and its obligation rests upon its legal successor, the Port of Mobile.

All laws passed since the making of the contract, whose purpose or effect is to take from the City of Mobile, or its successor, the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded. Mr. Justice Field, when delivering the judgment of this court in *Wolff* v. *New Orleans*, 103 U. S. 358, 368, said: "The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her and upon the continuance of which alone they can be enforced, can proceed, and by mandamus compel, at the instance of the parties interested, the exercise of that power, as if no such legislation had ever been attempted." And so in

Ralls County Court v. *United States*, 105 U. S. 733, 738, it was said by the Chief Justice, speaking for the court, that "all laws of the State which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and, under the well settled rule of decision in this court, the Circuit Court had authority, by mandamus, to require the County Court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent."

The Port of Mobile has the machinery and officers requisite for the assessment of property and for the levy and collection of taxes to carry on the City government. There is no reason why the taxes necessary to pay the judgment of the plaintiff cannot be levied and collected by the same officers. There is no obstacle to the full and complete performance by the Port of Mobile and the Mobile Police Board of the duties required by the peremptory writ of mandamus issued by the Circuit Court.

It follows from the views we have expressed that the judgment of the Circuit Court in favor of the plaintiff for $7308.80 and costs against the Port of Mobile, and the judgment directing the peremptory writ of mandamus to be issued against the Port of Mobile and the Mobile Police Board for the satisfaction of such judgment, are both warranted by law. *Judgments affirmed.*[1]

SHAPLEIGH *v.* CITY OF SAN ANGELO.

1897. 167 *U. S.* 646.[2]

ERROR to U. S. Circuit Court for Western District of Texas.

Action against the city of San Angelo, a city incorporated Feb. 10, 1892, under the laws of the State of Texas. Plaintiff seeks to recover for the amount of certain unpaid coupons for interest on bonds issued by a municipal organization, styled "the city of San Angelo," which, from January 18, 1889, to Dec. 15, 1891, exercised the powers of an incorporated city within territorial limits including all the territory afterwards embraced within the limits of the defendant corporation; and claiming to have been incorporated by certain entries made Jan. 18, 1889, upon the records of the commissioner's court of Tom Green

[1] "In *Deveraux* v. *City of Brownsville*, 29 Fed. Rep. 742, the ruling in *Mobile* v. *Watson*, *supra*, was followed and extended, it being declared not only that the succeeding corporation was liable for the existing debts of its predecessor, but that all the powers of taxation possessed by such predecessor, which had been conferred as a part of the remedy to which its creditors were entitled, survived to the new corporation, and that their exercise could be compelled by *mandamus*. It was also held that statutes which prohibited the exercise of these powers of taxation were void, as impairing the obligation of contracts." 1 Dillon's Mun. Corp., 4th ed., page 250, note 2. — ED.

[2] Statement abridged. Portions of opinion omitted.—ED.

County. Other material facts are stated in the opinion. The Circuit Court gave judgment for the defendant.

T. K. Skinker, for plaintiff in error.

No appearance for defendant in error.

SHIRAS, J. In January, 1889, the city of San Angelo was existing and acting as an organized municipal corporation, with a mayor, a board of aldermen and other functionaries. In pursuance of an ordinance of the city council in May, 1889, there were issued the bonds in question in this case. It was not denied that the proceedings were regular in form, that the bonds were duly executed and registered as required by law, that the proceeds of their sale were properly applied to improving the streets and public highways of the city, and that the plaintiff was a *bona fide* holder for value.

As things then stood, it is plain that the city could not have set up to defeat its obligations any supposed irregularity or illegality in its organization. The State, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the State acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

This is the general rule, and it is recognized in Texas: "If a municipality has been illegally constituted, the State alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter." *Graham* v. *City of Greenville*, 67 Texas, 62.

But, in 1890, at the fall term of the district court of Tom Green County, an information was filed by the county attorney against named persons, who were exercising and performing the duties, privileges and functions of a mayor and city council of the city of San Angelo, claiming the same to be a city duly and legally incorporated under the laws of the State, and alleging that said city was not legally incorporated, and that said named persons were unlawfully exercising said functions. Such proceedings were had that on December 15, 1891, the said district court entered a decree ousting the said persons from their said offices, and adjudging that the incorporation of said city of San Angelo be, and the same was thereby, abolished and declared to be null and void. The record does not distinctly disclose the ground upon which the court proceeded in disincorporating said city, but enough appears to justify the inference that the incorporation included within its limits unimproved pasture lands, outside of the territory actually inhabited, and that the incorporation was declared invalid for that reason.

Subsequently, on February 10, 1892, the city of San Angelo was again incorporated, excluding the unimproved lands, but including all the improved part of the prior incorporation, and in which existed the streets and highways in the construction of which the proceeds of the said bonds had been expended.

What was the legal effect of the disincorporation of the city of San Angelo and of its subsequent reincorporation as respects the bonds in

suit? Did the decree of the district court of Tom Green County, abolishing the city of San Angelo as incorporated in 1889, operate to render its incorporation void *ab initio*, and to nullify all its debts and obligations created while its validity was unchallenged? Or can it be held, consistently with legal principles, that the abolition of the city government, as at first organized, because of some disregard of law, and its reconstruction so as to include within its limits the public improvements for which bonds had been issued during the first organization, devolved upon the city so reorganized the obligations that would have attached to the original city if the State had continued to acquiesce in the validity of its incorporation?

[After referring to *Broughton* v. *Pensacola*, 93 U. S. 266; *Mount Pleasant* v. *Beckwith*, 100 U. S. 520; and *Mobile* v. *Watson*, 116 U. S. 289:]

The conclusions reached by this court may be thus expressed: The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities. Dillon's Mun. Corp. vol. 1, § 172, 4th ed.

This view of the law has been accepted and followed by the Supreme Court of the State of Texas. [Citing and stating *Morris* v. *State*, 62 Texas, 728, 730.]

The conclusion which is derivable from the authorities cited, and from the principles therein established, is that the disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and that upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligation of the old devolved upon the new corporation.

The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void *ab initio*, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation, which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody, except the State acting by direct proceedings. Such an organization is merely voidable, and if the State refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the State intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor. [The court then considered the legal

effect of the Texas statute of April 13, 1891; which the Texas court has construed as requiring a vote of the taxpaying voters in favor of assuming the debt before the new incorporation can be held for it.]

. . . Said act so construed must be regarded, as respects prior cases, as an act impairing the obligations of existing contracts. If the law, before the passage of the act of 1891, was that, by a voluntary reincorporation and a taking over of the property rights of the old corporation, the existing obligations devolved upon the new corporation, it would plainly not be a legitimate exercise of legislative power, as affecting such prior obligations, to substitute an obligation contingent upon a vote of the taxpayers.

. . . . . .

When we hold that the new corporation, under the facts disclosed by this record, is subject to the obligations of the preceding corporation, we mean subject to them as existing legal obligations, in manner and form as they would have been enforceable had there been no change of organization.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

CHAPTER III.

LIABILITY FOR TORTS.

[*Immunity of the State from Liability for Torts.*]

[THE rule of law with regard to the liability of the government is, that it is irresponsible, except so far as it has been made responsible by special statutes. This rule is applied to governmental contracts, not because the liability of the government for contracts is not recognized, but because the courts have not, in the absence of special statutes, jurisdiction of suits against the government based on contracts. . . . [But] while the government recognizes in theory its liability for contract, it does not recognize any liability for torts. Goodnow's Municipal Home Rule, pp. 106, 107.

One of the rules of the public law is that the government as a whole is not responsible for the torts which may have been committed by its officers. This rule of law is sometimes said to have originated in the maxim of the English law that the king can do no wrong. In this country, however, it has been held by the supreme judicial authority, namely, the Supreme Court of the United States, that the maxim has no existence in this country, either in reference to the government of the United States, or of the several States, or of any of their officers. The rule of law as to the immunity of the government for liability for the torts committed by its officers is really based upon the fact that the government is not regarded as a subject of private law. Ibid. p. 112.

Inasmuch, however, as not only the private but also the public law is based upon principles of justice, it is necessary for us, in order to get a satisfactory foundation for this particular principle of the public law, to go further and to ask, why should the public law relieve the government from liability for the wrongful acts of its officers? The reason is to be found in the fact that the government is generally acting as the representative of the sovereign, and that it is extremely difficult to hold the representative of the sovereign responsible for the mistakes and negligences of its officers so far as they are acting in this sovereign capacity. "Assuming the wrongful act to be imputable to the state, incident to the unavoidable imperfections of a machinery so complicated as its system of administration, the state enjoys, of course, by virtue of its sovereignty, the privilege of exempting itself from liability. A government which should hold itself responsible to all its citizens for any legal injury suffered by them through the exercise of public powers, which, in other words, should guarantee the just and perfect operation of its administrative and judicial machinery, might find itself confronted with claims and vexed with suits to such an extent as to be driven to a limitation of its liability."

It does not, however, follow, because when the government is acting as the representative of the sovereign it should be held exempt from liability, that this exemption should be extended to those branches of activity where it is acting more as does an ordinary private individual, and is entering into relations similar to the relations of the private law. Ibid. pp. 113, 114.

Granting that the state can hold property for purposes similar to those of an individual owner, it follows logically, that it should hold on similar conditions. A privilege which cannot be explained by the public functions and powers of the state is anomalous. The principal torts which may be imputable to the government in connection with its private relations are negligence, non-compliance with statutory regulations, nuisance, trespass, and a disturbance of natural easements. It is characteristic of these torts that they violate obligations which are imposed by law upon the ownership or occupation or control of property, that they are sometimes not directly attributable to a specific act of any particular agent, and that the existence of the wrongful condition is usually of some benefit to the owner. The liability of the state in these cases is demanded not only by justice but by the logic of the law. Its immunity cannot be placed upon any convincing argument. It is to be regretted that the courts have always denied the liability of the sovereign in sweeping terms. . . .

. . . In both England and the United States, however, the sovereign character of the government has not been lost sight of even when it enters into these private relations, and its immunity from all liability for tort is recognized. Ibid. pp. 115, 116, 117.]

RUSSELL *v.* THE MEN DWELLING IN THE COUNTY OF DEVON.

1788. 2 *Term Reports* (*Durnford & East*), 667.[1]

This was an action upon the case against the *men dwelling in the county of Devon*, to recover satisfaction for an injury done to the waggon of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared, and demurred generally.

Chambre, in support of the demurrer.

Gibbs, *contra*.

Lord Kenyon, C. J. If this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent the plaintiff's recovering, if by law he is entitled, yet it ought to have considerable weight in a case where it is admitted that there is no precedent of such an action having been before attempted. Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair. But the question here is,

[1] Arguments omitted. — Ed.

Whether this body of men, who are sued in the present action, are a corporation, or *quà* a corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the Legislature for that purpose. But it has been said that this action ought to be maintained by borrowing the rules of analogy from the statutes of hue and cry: but I think that those statutes prove the very reverse. The reason of the statute of *Winton* was this; as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction,[1] till the statute gave that remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore when the case called for a remedy, the Legislature interposed; but they only gave the remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced an injury to individuals. And when they gave the action, they virtually gave the means of maintaining that action; they converted the hundred into a corporation for that purpose: but it does not follow that, in this case where the Legislature has not given the remedy, this action can be maintained. And even if we could exercise a Legislative discretion in this case, there would be great reason for not giving this remedy; for the argument urged by the defendant's counsel, that all those who become inhabitants of the county, after the injury sustained and before judgment, would be liable to contribute their proportion, is entitled to great weight. It is true indeed that the inconvenience does happen in the case of indictments; but that is only because it is sanctioned by common law, the main pillar of which, as Lord *Coke* says, is unbroken usage. Among the several qualities which belong to corporations, one is, that they may sue and be sued; that puts it then in contradistinction to other persons. I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes; as if the king were to grant lands to them, rendering rent, like the grant to the good men of the town of *Islington*.[2] But where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate: but if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made. Therefore I think that this experiment ought not to be encouraged; there is no law or reason for supporting the action; and there is a precedent against it in *Brooke:* though even without that authority I should be of opinion that this action cannot be maintained.

Ashhurst, J. It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion

[1] *Vide ante*, 1 vol. 71. 2 *Wils.* 92, 3.

[2] *Dyer*, 100.

must have frequently happened. But it has been said that there is a principle of law on which this action may be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy. However there is no foundation on which this action can be supported; and if it had been intended, the Legislature would have interfered and given a remedy, as they did in the case of hue and cry. Thus this case stands on principle: but I think the case cited from *Broke's* Abridgement is a direct authority to shew that no such action can be maintained; and the reason of that case is a good one, namely, because the action must be brought against the public.

Buller, J., and Grose, J., assented.

Judgment for the defendants.

MOWER *v.* INHABITANTS OF LEICESTER.

1812. 9 *Massachusetts*, 237.[1]

Action at common law, to recover for damages sustained through the defect of a highway in the town of Leicester. Verdict for plaintiff. Motion in arrest of judgment.

Blake and *Lincoln*, for plaintiff.

An injury arising from the neglect of a duty enjoined by law, whether on an individual or a corporation, is a good foundation for an action at common law. Towns are by statute enjoined to maintain in good repair all highways within their respective limits: and in case of their neglect of their duty in this regard, and a special injury happening to an individual in consequence thereof, they are made liable to double the damages sustained thereby, after reasonable notice. Statute of 1786, ch. 81, sects. 1 and 7 . . . an action at common law, for the recovery of single damages only, will well lie for such an injury. . . .

None of the objections, which prevailed in the action of *Russell & al.* vs. *The men of Devon*, apply in this case. Here the town are a corporation created by statute, capable of suing and being sued. They are bound by statute to keep the publick highways in repair. They have a treasury, out of which judgments recovered against them may

[1] Statement abridged. — Ed.

be satisfied. They are called upon to answer only for their own default. The objection, that a multiplicity of actions would be the consequence of levying the execution on one or more individuals of the town, can have no effect here; since it would equally apply to every action against a town or parish: and yet such actions are every day brought and supported without hearing of this objection. Besides, individuals so situated have their remedy over against the corporation for the sum paid by them; and are not put to their action against each inhabitant for his several proportion, as the case referred to supposes in the case of an English county.

. . . . . .

Bigelow, for defendants. [Argument omitted.]

Curia. The plaintiff has brought his action against the inhabitants of the town of *Leicester*, for the loss of his horse, occasioned by the neglect of that town to keep a certain bridge in repair. The action is at common law; without alleging any notice to the inhabitants of the defect in the bridge, previously to the incurring of the damage by the plaintiff. — But it is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But *quasi* corporations, created by the legislature for purposes of publick policy, are subject by the common law, to an indictment for the neglect of duties enjoined on them: but are not liable to an action for such neglect, unless the action be given by some statute. The only action furnished by statute in this case is for double damages after notice, &c. — This question is fully discussed in the case of *Russell & al.* vs. *The men of Devon*, cited at the bar, and the reasoning there is conclusive against the action. *Judgment arrested.*[1]

[1] "In considering the subject of *the implied liability* (by which we mean a liability where there is no express statute creating or declaring it) of municipal corporations *to civil actions for misconduct or neglect on their part, or on the part of their officers in respect to corporate duties*, resulting in injuries to individuals, it is essential to bear in mind the distinction pointed out in a former chapter, and to be noticed again hereafter, between *municipal corporations* proper, such as towns and cities specially chartered or voluntarily organizing under general acts, and *involuntary quasi corporations*, such as townships, school districts, and counties (as these several organizations exist in most of the States), including therein for this purpose the peculiar form of organization, before referred to, known as the New England town. The decisions of the courts in this country are almost uniform in holding the former class of corporations to a much more extended liability than the latter, even where the latter are invested with corporate capacity and with the power of taxation; but respecting the *grounds* for this difference, there is considerable diversity of opinion." 2 Dillon Mun. Corp., 4th ed., s. 961. — Ed.

CITY OF DETROIT *v.* BLACKEBY.

1870. 21 *Michigan*, 84.[1]

Action against the city of Detroit for an injury occasioned by defects in a cross walk across a public street.

[There was no statute giving, in terms, an action against the city for damage occasioned by defects in streets; but the city was incorporated by special charter, and had, under the charter, the sole control of its streets and highways, with power to keep them in repair.]

In the Circuit Court the decision was for the plaintiff; and the city brought error.

J. P. Whittemore, for plaintiffs in error.

Geo. H. Prentis, and *Theo. Romeyn*, for defendants in error.

Campbell, C. J. . . . The streets of Detroit are public highways, designed like all other roads, for the benefit of all people desiring to travel upon them. The duty or power of keeping them in proper condition is a public and not a private duty, and it is an office for the performance of which there is no compensation given to the city. Whatever liability exists to perform this service to the public, and to respond for any failure to perform it, must arise, if at all, from the implication that is claimed to exist in the nature of such a municipality.

There is a vague impression that municipalities are bound in all cases to answer in damages for all private injuries from defects in the public ways. But the law in this State, and in most parts of the country, rejects this as a general proposition, and confines the recovery to causes of grievance arising under peculiar circumstances. If there is any ground for recovery here, it is because Detroit is incorporated. And it depends therefore on the consideration whether there is anything in the nature of incorporated municipalities like this which should subject them to liabilities not enforced against towns or counties. The cases which recognize the distinction apply it to villages and cities alike.

It has never been claimed that the violation of duty to the public was any more reprehensible in these corporations than outside of them; nor that there was any more justice in giving damages for an injury sustained in a city or village street than for one sustained outside of the corporate bounds. The private suffering is the same, and the official negligence may be the same. The reason, if it exists, is to be found in some other direction, and can only be tried by a comparison of some of the classes of authorities which have dealt with the subject in hand.

It has been held that corporations may be liable to suit for positive mischief produced by their active misconduct, and not from mere errors of judgment. . . . *Thayer v. The City of Boston*, 19 *Pick.*, 511, was a case of this kind, involving a direct encroachment on private prop-

[1] Statement abridged. Arguments omitted. — Ed.

erty. . . . *Lee v. Village of Sandy Hill*, 40 *N. Y.*, 442, involved a direct trespass.

The injuries involved in these New York and Massachusetts cases referred to were not the result of public nuisances, but were purely private grievances. And in several cases cited on the argument, the mischiefs complained of were altogether private. The distinction between these and public nuisances or neglects has not always been observed, and has led to some of the confusion which is found in the authorities. In all the cases involving injuries from obstructions to drainage, the grievance was a private nuisance. [After referring to authorities.] Upon any theory which sustains the liability for such grievances, however, it is manifest that the injury is not a public grievance in any sense, and does not involve a special private damage from an act that at the same time affects injuriously the whole people.

Another class of injuries involves a public grievance specially injuring an individual, arising out of some neglect or misconduct in the management of some of those works which are held in New York to concern the municipality in its private interests, and to be in law the same as private enterprises.

. . . . . .

The cases in which cities and villages have been held subject to suits for neglect of public duty, in not keeping highways in repair, where none of the other elements have been taken into the account, are not numerous, and all which quote any authority profess to rest especially upon the New York cases, except where the remedy is statutory.

. . . . . .

[After citing various New York cases.]

But the case of *Weet v. Brockport*, 16 *N. Y.*, 161, is recognized as the one in which the whole law has been finally settled, and it is upon the grounds there laid down, that the liability is now fixed in New York. The elaborate opinion of Judge Selden, which was adopted by the Court of Appeals, denies the correctness of the *dicta* in some of the previous cases, and asserts the liability to an action solely upon the ground that the franchises granted to municipal corporations are in law a sufficient consideration for an implied promise to perform with fidelity all the duties imposed by the charter; — and that the liability is the same as that which attaches against individuals who have franchises in ferries, toll-bridges, and the like. The principle, as he states it, is: — "That whenever an individual, or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases, the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance."

In order to get at the true ground of liability, the opinion goes on to

determine, *first*, whether townships and other public bodies, not being incorporated cities or villages, are liable, and shows conclusively that they are not. And the Court arrive at this conclusion, not on the basis of an absence of duty or an absence of means, but because their duties are duties to the public, and not to individuals. To show this, full citations are made from the English cases, which were cited before us, and also from the American cases.

. . . . . .

It is admitted everywhere, except in a single case in Maryland, that there is no common-law liability against ordinary municipal corporations such as towns and counties, and that they cannot be sued except by statute.

It has also been uniformly held in New York, as well as elsewhere, that public officers, whose offices are created by act of the Legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it unless it is authorized or ratified expressly or by implication. This doctrine has been applied to cities as well as to all other corporations.

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And the numerous cases which exonerate cities from liability for not enforcing their police laws, so as to prevent damage, rest upon a very similar basis.

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In the case of *Eastman v. Meredith*, 36 *N. H.*, 284, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature, which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies. They may own private property, and transact business not strictly municipal, if allowed by law to do so, just as private parties may, and with the same liability. But their public functions are all held at sufferance, and their duties may be multiplied and enforced at the pleasure of the Legislature. They have no choice in the matter. They have no privileges which cannot be taken away, and they derive no profit from their care of the public ways, and the execution of their public functions. They differ from towns only in the extent of their powers and duties bestowed for public purposes, and their improvements are made by taxation, just as they are made on a smaller scale in towns and counties.

. . . Because streets are not private, and because, in this State, at least, no municipality can exercise any powers except by State permission, and every municipal charter is liable to be amended at pleasure. The charter of Detroit has undergone the most radical changes.

It is impossible to sustain the proposition that these charters rest in contract. And it is impossible, — as Judge Selden demonstrates, to find

legal warrant for any other ground for distinguishing the liability of one municipal body from that of another. There is no basis in authority for any such distinction concerning the consideration on which their powers are granted, and it rests upon simple assertion.

. . . . . .

It is impossible to harmonize the decision [of the New York Court] with the previous decisions exempting corporations from responsibility because public officers were not their agents. It is no easier to sustain it in the face of the uniform decisions denying liability for failure to enforce their police regulations. The authorities which make corporations liable on the ground of conditions attached to their franchises, go very far towards compelling them to respond as absolutely bound to prevent mischief. And the general reasoning on which the most of the opinion rests, and the criticisms made upon former decisions, — which, it is asserted, went altogether too far in creating liability, — all are designed to show, and do show, very forcibly that simply as municipal corporations, — apart from any contract theory, — no public bodies can be made responsible for official neglect involving no active misfeasance.

There is no such distinction recognized in the law elsewhere. In *City of Providence v. Clapp*, 17 *How. R.*, 161, the United States Supreme Court, through Judge Nelson, held that cities and towns were alike in their responsibility and in their immunity. In *County Commissioners of Anne Arundel v. Duckett*, 20 *Md.*, 468, a county was held responsible to the fullest extent. In New Jersey, in *Freeholders of Sussex v. Strader*, 3 *Harr.* (18 *N. J.*), 108; *Cooley v. Freeholders of Essex*, 27 *N. J.*, 415; *Livermore v. Freeholders of Camden*, 29 *N. J.*, 245, and 2 *Vroom* (31 *N. J.*), 507; and *Pray v. Mayor of Jersey City*, 32 *N. J.*, 394, the cases were all rested on the same principles, and cities were exonerated because towns and counties were. The suggestion of Judge Selden has been caught at by some courts since the decision, and has been carried to its legitimate results, as in *Jones v. New Haven*, 34 *Conn.*, 1, where the damage was caused by a falling limb of a tree. But, so far as we have seen, even the cases which are decided on this ground, do not hold that towns do not receive their powers upon a consideration as well as cities. That question still remains to be handled in those courts.

It is utterly impossible to draw any rational distinction on any such ground. It is competent for the Legislature to give towns and counties powers as large as those granted to cities. Each receives what is supposed to be necessary or convenient, and each receives this because the good government of the people is supposed to require it. It would be contrary to every principle of fairness to give special privileges to any part of the people and deny them to others; and such is not the purpose of city charters. In England the burgesses of boroughs and cities had very important and valuable privileges of an exclusive nature, and not common to all the people of the realm. The charters were grants of privilege and not mere government agencies. Their free customs

and liberties were put by the great charter under the same immunity with private freeholds. But in this State, and in this country generally, they are not placed beyond legislative control. The Dartmouth College case, which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found anywhere, which holds that either offices or municipal charters generally involve any rights of property whatever. They are all created for public uses and subject to public control.

We think that it will require legislative action to create any liability to private suit for non-repair of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative questions of importance and some nicety. They cannot be solved by courts.

Judgment should be reversed with costs.

CHRISTIANCY and GRAVES, JJ. concurred.

COOLEY, J. dissenting.

It is unquestionably, I think, a rule of sound public policy, that a municipal corporation which is vested with full control of the public streets within its limits, and chargeable with the duty of keeping them in repair, and which also possesses by law the means of repair, should be held liable to an individual who has suffered injury by a failure to perform this duty. If we sat here as legislators to determine what the law ought to be, I think we should have no difficulty in coming to this conclusion.

But we sit here in a judicial capacity, and the question presented is, what is the law, and not what ought the law to be. This question is to be determined upon common-law principles, and the most satisfactory evidence of what those principles are is to be found in the decisions of the courts.

The decisions which are in point are numerous; they have been made in many different jurisdictions, and by many able jurists, — and there has been a general concurrence in declaring the law to be in fact what we have already said in point of sound policy it ought to be. We are asked, nevertheless, to disregard these decisions, and to establish for this State a rule of law different from that which prevails elsewhere, and different from that which, I think, has been understood and accepted as sound law in this State prior to the present litigation.

The reason pressed upon us for such a decision is, not that the decisions referred to are vicious in their results, but that the reasons assigned for them are insufficient, so that, logically, the courts ought to have come to a different conclusion.

I doubt if it is a sufficient reason for overturning an established doctrine in the law, when its results are not mischievous, that strict logical reasoning should have led the courts to a different conclusion in the beginning; if it is, we may be called upon to examine the foundation of many rules of the common law which have always passed unquestioned.

I concur fully in the doctrine that a municipal corporation or body is not liable to an individual damnified by the exercise, or the failure to exercise, a legislative authority; and I also agree that the political divisions of the State, which have duties imposed upon them by general law without their assent, are not liable to respond to individuals in damages for their neglect, unless expressly made so by statute. Upon these two points the authorities are generally agreed, and the result is well stated in the opinion of the Chief Justice.

The question for us to decide is, whether a different rule applies where a municipal corporation exists under a special charter which confers peculiar powers and privileges, and imposes special duties, from that which prevails in the case of towns and counties. The authorities have found reason for a distinction, and I am not yet prepared to say that their reason is baseless.

The leading case on the subject is *Henley v. The Mayor and Burgesses of Lyme Regis*, which went from the Common Pleas through the King's Bench to the House of Lords, and is reported in 5 *Bing.*, 91; 3 *Barn. and Ad.*, 77, and 1 *Bing. N. C.*, 222. In that case it appeared that the King, by letters patent, had granted to the Mayor and Burgesses of Lyme Regis the borough or town of that name, and also the pier, quay, or cob, with all liberties, profits, etc., belonging to the same, and remitted a part of their ancient rent, expressing his will therein, that the said Mayor and Burgesses and their successors, all and singular, the buildings, banks, sea-shores, etc., within the said borough, or thereunto belonging, or situate between the same and the sea, and also the said pier, etc., at their own costs and charges, should repair, maintain and support. All the courts held that the defendants, having accepted the charter, became legally bound to repair the buildings, banks, etc., and that as this obligation was one which concerned the public, an action on the case would lie against them for a direct and particular damage sustained by an individual in consequence of a neglect to perform it. The reasoning was, that the things granted by the charter were the consideration for the repairs to be made; and that the corporation, by accepting the letters patent, bound themselves to do these repairs. This decision is the unquestioned law of England to the present time, and is referred to with approbation in the American cases.

I do not understand this decision or the previous and analogous one of *Mayor of Lynn v. Turner, Corp.*, 86, to be questioned in the present case; but it is contended that neither is applicable, because the grant was one for the benefit of the corporators, which they might accept or refuse at their option, but which, if accepted, must be taken *cum onere*, and the acceptance was in the nature of a covenant to perform the duty imposed. Moreover, that duty, it is said, was individual, not governmental; and the responsibility for failure to perform it would not depend on negligence, notice, or any other contingency not expressed in the covenant; and in any point of view it is argued that these deci-

sions have no more bearing upon the question of public duties and public responsibilities, than if the grants to the corporations in these cases had been made to individual residents.

This is not the first time that this view of the cases referred to has been presented to the courts. It was very fully examined by Mr. Justice Selden in *Weet v. Brockport*, 16 *N. Y.*, 161, *note*, and in his opinion there was nothing in it which should exempt municipal corporations from the principle declared, even when the neglect of duty relates to a governmental power. "It is well known," he very truly says, that "charters are never imposed upon municipal bodies except at their urgent request. While they may be governmental measures in theory, they are, in fact, regarded as privileges of great value, and the franchises they confer are usually sought for with much earnestness before they are granted. The surrender by the Government to the municipality of a portion of the sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking on the part of the corporation, to perform with fidelity the duties which the charter imposes." *Ibid.*, 171.

Now it does not appear to me to be a sufficient answer to this position, that the State *might*, if it saw fit, impose a municipal charter upon the people without their consent and even against their remonstrance. That is not the ordinary course of events, and the question for us to consider is — What is the legal significance of things as they actually occur? We find, as matter of fact, that people apply for a charter conferring such privileges as they deem important, in view of their actual circumstances, and that many of these privileges are quite superior to, and more valuable than, those possessed by the people generally. When the Legislature grants these privileges it imposes concurrent duties. What is the fair construction of these acts of the people and the Legislature respectively, — the people in soliciting the privileges, and the Legislature in attaching the duties to the grant which it makes? This is the question which we are to consider.

The New York courts have invariably held that when the people of the municipality accepted the charter which they had thus solicited, a contract was implied on their part to perform the corporate duties. They have always denied that in this respect there was any difference between a municipal corporation and a private corporation or private individual, who had received from the sovereignty a valuable grant, charged with conditions. — *Hutson v. N. Y.*, 9 *N. Y.*, 163; *Weet v. Brockport*, 16 *N. Y.*, *note*, 161; *Conrad v. Ithaca*, 16 *N. Y.*, 158; *Storrs v. Utica*, 17 *N. Y.*, 104; *Mills v. Brooklyn*, 32 *N. Y.*, 489; *Lee v. Sandy Hill*, 40 *N. Y.*, 442. The same decision has frequently been made in other States. *Meares v. Wilmington*, 9 *Ired.*, 73; *Pittsburgh v. Grier*, 22 *Penn. St.*, 63; *Erie v. Schwingle*, *Ibid.*, 388; *Ross v. Madison*, 1 *Ind.*, 281; *Stackhouse v. LaFayette*, 26 *Ind.*, 17; *Smoot v. Wetumpka*, 24 *Ala.*, 112; *Browning v. Springfield*, 17 *Ill.*, 143, in which the question is very fully and carefully considered by Mr. Chief

Justice Scates. *Commissioners v. Duckett*, 20 *Md.*, 468; *Sawyer v. Corse*, 17 *Grat.*, 241; *Richmond v. Long*, *Ibid.*, 375; *Bigelow v. Randolph*, 14 *Gray*, 541, which, though not an express authority, recognizes the doctrine: *Jones v. New Haven*, 32 *Conn.*, 1; *Cook v. Milwaukee*, recently decided by the Supreme Court of Wisconsin, and to be found in 9 *Law Reg. N. S.* 263 [24 *Wis.*, 270].

The same question has also been frequently and fully examined by the Supreme Court of the United States, and no doctrine is more firmly settled in that Court than that municipal corporations are liable for negligence in cases like the present. It will be sufficient, perhaps, to refer to the case of *Weightman v. Washington*, 1 *Black*, 39, in which the English and American cases were examined, but the same question has frequently been brought to the attention of the Court since, and uniformly with the same result.

And it is remarkable that in all the cases which have upheld this doctrine there has scarcely been a whisper of judicial dissent. It would be difficult to mention another so important question, which has been so often, so carefully, and so dispassionately examined, and with such uniform result. In no State is the doctrine of *Henley v. Mayor, etc., of Lyme Regis*, as applied in *Weet v. Brockport*, denied except in New Jersey, and in that State the authorities I have referred to seem to have been passed over in silence and perhaps were not observed.

We are asked, therefore, to overrule a rule of law which is safe, useful and politic in its operation, and which has been generally accepted throughout the Union, not through inadvertence or by surprise, but after careful, patient and repeated examination upon principle, by many able jurists, who have successively given due consideration to the fallacies supposed to underlie it. For my own part I must say that the fallacies are not clearly apparent to my mind, and I therefore prefer to stand with the authorities. And I deem it proper to add also, that, inasmuch as the rule of responsibility in question seems to me a just and proper one, I should be inclined, if my judgment of its logical soundness were otherwise, to defer to the previous decisions, and leave the Legislature to alter the rule if they should see fit.[1]

[1] [As to civil liability for damages from defective streets.]

"The cases may be grouped into the following classes: —

"*First.* Where neither chartered cities nor counties or other *quasi* corporations are held to an implied civil liability. Only a few States have adopted this extreme view of exempting cities from liability in this respect.

"*Second.* Where the reverse is held, and both chartered cities and counties are alike considered to be impliedly liable for their neglect of the duty in question. This doctrine prevails in a small number of States.

"*Third.* Where municipal corporations proper, such as chartered cities, are held to an implied civil liability for damages caused to travellers of a defective and unsafe streets under their control, but denying that such a liability attaches to counties or other *quasi* corporations as respects highways and bridges under their charge. This distinction has received judicial sanction in a large majority of the States, where the legislation is silent in respect of corporate liability." 2 Dillon, Mun. Corp., 4th ed., § 999. — Ed.

McDADE *v.* CITY OF CHESTER.

1888. 117 *Pa. State*, 414.[1]

Action on the case against the city of Chester, to recover damages for personal injury received by the plaintiff, from the explosion of a manufactory of fireworks, operated in that city. The manufactory was the individual property of the operator, and was located upon his ground. The case came before the court upon a demurrer to the declaration. The plaintiff, in the declaration, alleged in substance that it was the duty of the city to have suppressed this manufactory of fireworks; that this duty was neglected; and that, in consequence of this neglect, the plaintiff received his injuries.

By the special act of incorporation, the mayor and councils of the city were empowered to make all such by-laws and ordinances "as they may deem necessary to preserve the peace and promote the good order, government, and welfare of the said city, and the prosperity and happiness of the inhabitants thereof." By subsequent acts they were empowered to prohibit the manufacture of fireworks; to prohibit and remove any nuisance, whether on public or private ground; and to cause the removal of any nuisance "by such means as to them shall seem best."

The court below gave judgment for defendant on the demurrer.

Plaintiff brought error.

John V. Rice (*Garnett Pendleton* with him), for plaintiff in error.

Orlando Harvey, for defendant in error.

Clark, J. [After stating the facts, and citing authorities applicable to a case where "a legal duty has been imposed by statute upon a municipal corporation."] But the duty imposed must be absolute or imperative, not such as under a grant of authority is intrusted to the judgment and discretion of the municipal authorities; for it is a well settled doctrine that a municipal corporation is not liable to an action for damages, either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character. Dillon Mun. Corp. § 949.

. . . . . .

It is likewise true that when a power is given to do an act which concerns the public interest, the execution of the power, when applied to a public officer or body, may be insisted upon as a duty, although the phraseology of the statute be permissive only; especially is this so when there is nothing in the act save the permissive form of expression to denote that the legislature designed to lodge a discretionary power merely. But where the power is lodged with persons exercising, or to exercise, legislative or judicial functions, and the subject-matter of the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed. The true rule is

[1] Statement abridged. Arguments omitted. — Ed.

very correctly stated in our own case of Carr v. Northern Liberties, 35 Pa. 330, as follows: "Where any person has the right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but where the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed."

. . . . . .

The language of the several statutes above referred to is plainly permissive only. . . . It is plain, we think, that all the various matters mentioned in the eighth section, including the prohibition and abatement of nuisances, were given into the control of municipalities as proper subjects for legislation in the government of the city; and as such action necessarily involves the exercise of discretion, no absolute duty was imposed or intended to be imposed by the legislature. The whole question is one of legislative intention, and we find nothing in these several statutes to indicate that the legislature meant more than is plainly expressed.

There can be no doubt whatever that the municipal authorities of the city of Chester had full power to act in the premises. They had undoubted authority either to limit or to prohibit altogether the manufacture, sale or exposure of fire-works within the corporate limits, and to provide such safe-guards for the security of its citizens as in their judgment might be necessary. This subject-matter had been especially intrusted to their judgment and discretion in the charter and acts of assembly mentioned; but certainly no person had any right to demand the exercise of this power in any particular way or to any greater extent than the mayor and councils, in good faith and in the exercise of their discretion, might see proper to provide.

. . . . . .

Judgment affirmed.

LEVY *v.* MAYOR &c. OF NEW YORK.

1848. 1 *Sandford, New York Superior Court*, 465.[1]

The city of New York, having the requisite power, enacted an ordinance prohibiting swine from running at large in the streets, with a penalty and also a provision for impounding the animals. The city neglected to enforce the ordinance. A swine, suffered to roam at large in the street, attacked the plaintiff's son, aged 8. The boy was mortally injured, dying the next day. The father brought an action on the case against the city, to recover damages for the loss of his son's services and for the expenses of burial. The declaration alleged, in substance, the foregoing facts. The defendants demurred.

[1] Statement abridged.— Ed.

Willis Hall, for defendants.

T. Warner, for plaintiff.

SANDFORD, J. The plaintiff's counsel well observed, that there was no precedent for such an action as this; and we are compelled to add, that there is no principle upon which it can be sustained.

The corporation is undoubtedly vested with certain legislative powers, among which is the authority to restrain swine from running at large in the streets; and they have exercised it by enacting an ordinance to that effect. The idea, that because they *may* prohibit a nuisance, that therefore they must not only pass a prohibitory law, but must also enforce it, at the hazard of being subjected to all damages which may ensue from such nuisance, is certainly novel. The corporation of the city, in this respect, stands upon the same footing within its own jurisdiction, as the state government does in respect of the state at large.

It is the duty of the government to protect and preserve the rights of the citizens of the state, both in person and property, and it should provide and enforce wholesome laws for that object. But injuries to both person and property will occur, which no legislation can prevent, and which no system of laws can adequately redress. The government does not guaranty its citizens against all the casualties incident to humanity or to civil society; and we believe it has never been called upon to make good, by way of damages, its inability to protect against such misfortunes.

There would be no end to the claims against this city and state, if such an action as this is well founded. If a man were to be run over, and his leg broken by an omnibus racing in the street, he would forthwith sue the city for damages, because the corporate authorities neglected to enforce their ordinance against racing and furious driving in the public streets. So, if some miscreant, by placing a stick of timber on a railroad track, should cause the destruction of a passenger train, with great loss of life and limb; the legislature would be petitioned by the injured survivors, and the relatives of the deceased, for the damages thereby occasioned, on the ground, that the public servants should have enforced the statute enacted against such offences.

There are innumerable illustrations of the application of the principle. It suffices to say, that no government, whether national, state or municipal, ever assumed, or was subjected to a general liability of this description.

There is no analogy between a municipal corporation in respect of its legislative functions, and the duty or the liability of turnpike companies, or other private corporations aggregate. And the same may be said of the duty of commissioners of highways, and like public officers, clothed with adequate power for the performance of some plain executive or ministerial duty.

As to the argument that the common law imposes upon the corporation the duty and liability in question; we are unable to appreciate it.

Nor do we understand, that as a corporation, it is subjected *per se*, to the duty of keeping swine out of the streets.

We have had occasion frequently to hold the city liable for the negligence and misfeasance of its officers and agents; but the principle of that liability, has no application here.

Waiving the consideration of the other objections to the action, which are presented by the demurrers, we must decide, that the suit cannot be maintained.

Judgment for the defendants.

EASTMAN *v.* MEREDITH.

1858. 36 *New Hampshire*, 284.[1]

Perley, C. J. The following may be taken for a general statement of the case set up by the plaintiff. The town of Meredith built a town-house, to be used for holding town-meetings and other public purposes. The house, by the default and negligence of those who built it in behalf of the town, was so improperly constructed that the flooring gave way at the annual town-meeting in 1855, and the plaintiff, an inhabitant and legal voter, in attendance on the meeting, received a serious bodily injury. The accident and injury were caused by the defects and insufficiency of the building.

Assuming that it was the duty of the town to provide a safe and suitable place for holding town-meetings, the question will remain, whether a citizen of the town, who suffers a private injury in the exercise of his public rights from neglect of the town to perform this public duty, can maintain an action against the town to recover damages for the injury?

Towns in this State are declared by statute to be corporations, and consequently may sue and be sued in reference to all their legal rights and liabilities. But declaring them to be corporations cannot confer upon them other powers or subject them to other duties than those which are conferred and imposed either by express provision of some statute, or are implied from the general character and design of such public corporations. *Hooper* v. *Emery*, 14 Maine 377.

We have no statute which gives an action against a town for an injury like that complained of in this suit; but the general position taken for the plaintiff is this: The town is a corporation; it was a public duty of the town to provide a safe and proper place for holding the annual town meetings; the plaintiff has suffered a private injury from neglect of the town to perform this public duty, and the law holds a corporation liable to an individual for any private damage that he may suffer from neglect of the corporation to perform a public duty.

[1] Arguments omitted. — Ed.

In considering the authorities which have been relied on to sustain the general position of the plaintiff, it may be well to distinguish the different classes of corporations that have public duties to perform, and advert to the grounds upon which, in different cases, the legal liability for neglect to perform the public duty has been held to rest.

Private corporations, by the conditions, express or implied, upon which they hold their corporate powers, are frequently charged with the performance of public duties; and where a private corporation, like a turnpike, a canal, or a railroad, accepts a grant of corporate powers upon condition of performing a public duty, and an individual suffers a private damage from neglect of the corporation to perform the public duty, it is well settled, upon the authority of numerous cases, that he may maintain an action against the delinquent corporation, to recover his damages. A large proportion of the cases cited for the plaintiff are of this character.

So in England, where a public duty is imposed on a municipal corporation as a condition upon which the corporate franchises or corporate property have been granted; or where the corporation holds its franchises or property by a prescription from which a grant on like condition may be inferred, it has been held that any individual may maintain an action against the corporation to recover damages for an injury which he has suffered from neglect to perform the public duty. In *Henley* v. *Lyme Regis*, 5 Bingham 91, *S. C. in Error*, 3 B. & Adol. 77, and 1 Bingham N. C. 222, the corporation held their franchise of a borough, and also a pier or quay, with the right to take tolls under a grant from the crown, in which they were directed to repair a sea wall; and it was held that the plaintiff might maintain an action to recover damages which he had sustained by the neglect of the corporation to repair the wall. In that case, 1 Bing. N. C. 222, it was said that where a matter of general and public concern is involved, "and the king, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action." In the *Mayor of Lyme in Error* v. *Turner*, Cowper 87, the corporation had immemorially repaired and cleansed a creek, and the plaintiff maintained his action against the corporation for damage caused by interruption of the navigation of the creek for want of cleansing and repairing. In that case it was said by Lord *Mansfield* that as the defendants were bound by the prescription to repair, "it might be the very condition and terms of their creation or charter." In these cases the right to maintain the civil action appears to be placed on the ground that the municipal corporation accepted the grant of their franchises or their property from the crown upon the condition of performing the public duty, and were parties to a contract with the government in the same way as private corporations are, which accept the grant of corporate powers upon similar conditions.

It is also to be observed that municipal corporations in England are broadly distinguished in many important respects from towns in this and the other New-England States. There is no uniformity in the powers and duties of English municipal corporations. They are not created and established under any general public law, but the powers and duties of each municipality depend on its own individual grant or prescription. Their corporate franchises are held of the crown by the tenure of performing the conditions upon which they have been granted, and are liable to forfeiture for breach of the conditions. They indeed answer certain public purposes, as private corporations do, which have public duties to perform, and some of them exercise political rights. But they are not, like towns, general political and territorial divisions of the country, with uniform powers and duties, defined and varied, from time to time, by general legislation. Towns do not hold their powers ordinarily under any grant from the government to the individual corporation; or by virtue of any contract with the government, or upon any condition, express or implied. They give no assent in their corporate capacity to the laws which impose their public duties or fix their territorial limits. In all that is material to the present inquiry, municipal corporations in England bear much less resemblance to towns in this country, than to private corporations which are charged with the performance of public duties, and for this reason the English authorities on the subject are but remotely applicable to the present case.

Grants are sometimes made to particular towns or cities, of special powers, not belonging to them under the general law; and there is a class of cases, in which towns and cities have been held liable to civil actions for damages caused by neglect to perform public duties growing out of the grant of such special powers: as the power to bring water by an aqueduct for public use by those who pay a compensation for it; to light the place with gas, on the same terms, or to make and maintain sewers at the expense of adjoining proprietors. Thus in *The Mayor, &c., of New-York in Error* v. *Furze*, 3 Hill 612, the city was empowered by a special act to lay down and maintain sewers, and charge the expense upon owners and occupants of houses and lots intended to be benefited: and it was held that an individual might maintain an action against the city to recover damages for a private injury which he had suffered from neglect of the city to keep the sewers in proper repair. The distinction between the liability of towns and cities for neglect to perform public duties growing out of the powers which they exercise under the general law, and their liability when the duty arises from the grant of some special power conferred on the particular town or city, is recognized or explained in *Bailey* v. *The Mayor, &c., of New-York*, 3 Hill 531.

The decision in *Lloyd* v. *The Mayor, &c., of New-York*, 1 Selden 374, is put upon this distinction, between a duty arising from the grant of a special power, and a duty implied from the exercise of political

rights under the general law. "The corporation of the city of New-York," it is said in that case, "possess two kinds of powers, one governmental and public, and, to the extent *they* are held and exercised, is clothed with sovereignty; the other, private, and, to the extent *they* are held and exercised, is a legal individual. The former are given and used for public purposes; the latter, for private purposes; while in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter, a legal individual." "The rules of law are clear and explicit which establish the rights, immunities and liabilities of the appellants, when in the exercise of each class of powers."

In some of the cases in which cities have been held liable to a civil action for neglect to perform public duties, growing out of grants conferring special powers and privileges, stress appears to have been laid on the circumstance that the city derived a direct pecuniary profit from the grant, in the shape of a toll or rent. But in other cases, where no benefit of that kind was derived from the grant, cities have been held liable, and the decision has been put on the ground that the grant of special powers, though not the source of any direct pecuniary profit, was yet in the nature of a special privilege or immunity, granted for the particular local advantage of the city, and placed the corporation on the same footing of liability as if the benefit were in the shape of a rent, or toll, or other pecuniary income; that the grant was made and *accepted* on the same implied condition of performing the public duties growing out of it, as if it had afforded a direct profit in money.

In *Mears* v. *The Commissioners of Wilmington*, 9 Iredell 73, the corporation were sued for undermining a brick wall in grading a street, under authority conferred on the town by sundry special acts of the Legislature, and were held liable to the action. In that case the court say, "when the sovereign grants power to a municipal corporation to grade the streets, the grant is made for the public benefit, and is *accepted* because of the benefit which the corporation expects to receive, not by making money directly, but by making it more convenient for individuals composing the corporation or town to pass and repass in the transaction of business, and to benefit them by holding out greater inducements for others to frequent the town. The only distinction is that in one case the money is received directly, in the other indirectly. But in both cases the individuals composing the stockholders," (that is, in the private corporation,) "and the citizens of the town, derive special benefit from the work." *Cunliffe* v. *The Mayor, &c., of Albany*, 2 Barb. Sup. Ct. 190, would seem to fall into the same class of cases. There the city claimed authority under a special act to improve the navigation of Albany Basin, and to maintain a bridge; and having altered the construction of the bridge under authority of the act, were decided to be liable to the plaintiff for an injury caused by the bridge while he was on it. So of *Rochester White Lead Co.* v. *The City of Rochester*, 3 Comstock 463, and *Clark* v. *Washington*, 12 Wheaton 40.

In such cases the special powers thus granted are not held by the particular town or city under the general law, and as one of the political divisions of the country. The public duty grows out of the special grant of power; and, though held and exercised by a town or city, the nature of the power granted is the same as if a like power had been conferred on a private corporation created to answer the same public object, and the cases above referred to hold the town or city liable to a civil action for neglect to perform a public duty arising from the grant of the special power in the same way, and, as I understand them, upon the same grounds and reasons, as private corporations are held, which are clothed with the same powers and bound to the performance of the same public duties. So far as I have had opportunity to examine this class of cases, they appear to go upon the ground that the special power, though no direct pecuniary profit may be derived from it, is granted as an immunity and peculiar privilege, for the benefit of the particular town or city, and is accepted, as in the case of a private corporation, upon the implied condition of performing the public duties imposed by it and growing out of it. *Henley* v. *Lyme Regis*, 1 Bing. N. C. 222; *Mears* v. *Wilmington*, 9 Iredell 73; *Mayor, &c., of New-York* v. *Bailey*, 2 Denio 456.

This distinction between corporations that voluntarily accept the grant of special powers from the government, and the inhabitants of any district who are by statute invested with particular powers without their consent, is stated and relied on by *Parsons*, C. J., in the early case of *Riddle* v. *Locks and Canals*, 7 Mass. 187, and is recognized in *Sears* v. *The Turnpike*, 7 Ct. 9.

The case of *Pittsburg City in Error* v. *Grier*, 22 Penn. 54, cited for the plaintiff, stands upon grounds which clearly distinguish it from the present. The city, in that case, was in possession of a public wharf, exercising an exclusive supervision over it, and receiving tolls for its use; and the plaintiff sustained a special injury from the neglect of the city to keep the wharf in order. *Black*, C. J., delivering the opinion of the court, says, "The rule undoubtedly is, that those who have a public work under their control are bound to repair it, and the force of this obligation is still further increased when it yields its possessors a revenue. The cases above cited show that this principle applies to public ports in possession of a city, as well as canals, bridges and other highways in the hands of individuals and private corporations." "The injury is a violation of the duty which arises out of the control which the city has over the port, and her receipt of tolls from the vessels which come into it." The case is thus put distinctly on the ground that the public duty which was the foundation of the action arose out of the control which the city exercised over the wharf and the income received for the use of it.

In several of the cases cited for the plaintiff, cities and towns have been held liable for private injuries done by them in the course of executing works which they were by law authorized to perform. In

Scott v. *The Mayor and Aldermen of Manchester*, 37 Law & Eq. 495, by the carelessness of workmen whom the defendants employed in laying gas-pipes, a piece of metal was thrown into the plaintiff's eye, and the city was held to be liable. So in *Delmonico* v. *The Mayor, &c., of New-York*, 1 Sanford 222, an action was maintained for damage suffered by the plaintiff from the negligence of the defendants in the process of constructing a sewer. The remarks of the court in *Anthony* v. *Adams*, 1 Met. 285, are to the point, that an action may be maintained against a town in such a case. The plaintiff, in cases of this character, does not recover on the ground that he has been denied any public right which the corporation owed to him as a citizen of the town, or because he has suffered an injury in the exercise of a public right, from neglect of the town to perform a public duty. The corporation being authorized by law to execute the work, if, in their manner of doing it, they cause a private injury, they are answerable in the same way and on the same principle as an individual who injures another by the wrongful manner in which he performs an act lawful in itself. It has been sometimes made a question, whether in the particular case the corporation were liable as principals for the conduct of those who performed the work on their account; but where a work is once conceded to be done by the corporation, it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable like an individual for injuries caused by negligence in the process of executing the work.

Then, again, towns and other municipal corporations, including counties in this State, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries, caused by the improper management of their property, as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property. *Bailey* v. *The Mayor, &c., of New-York*, 3 Hill 541. So far as they are the owners and managers of property, there would seem to be no sound reason for exempting them from the general maxim which requires an individual so to use his own that he shall not injure that which belongs to another. So if a town or city maintain an erection or structure which is a private nuisance, and causes a special damage, or, in the performance of an authorized act, invade any right of property, the corporation has been held liable to a civil action. *Thayer* v. *Boston*, 19 Pick. 511; *Akron* v. *McComb*, 18 Ohio 229; *Rhodes* v. *Cleveland*, 10 Ohio 159. If the defendants in the present case had laid and maintained the foundations of their town-house across a stream, and caused the water to flow back on the plaintiff's land, according to these authorities they would have been liable to an action for the damage.

The case of the plaintiff cannot be classed with any of those to which we have adverted. The question here is, whether a town is liable to the action of a citizen of the town who has suffered a special damage from neglect of the town to provide a safe place for holding

the annual town-meeting. The public duty relied on is not enjoined by express provision of any statute. If such a duty exists, it is implied from the general character and design of such *quasi* corporations, and must depend on the general law applicable to all towns. Here is no contract, express or implied, between the State and the individual town, and no grant of any special power or privilege which can be supposed to have been voluntarily accepted by the town upon condition of performing the public duty. Towns are involuntary territorial and political divisions of the State, like counties, established for purposes of government and municipal regulation. It is chiefly through this organization of towns that the people exercise the sovereign power of government; and the plaintiff's claim is for damages which he has suffered from neglect of the town to provide him a safe place for the exercise of his public and political rights as a citizen of the town and State. Among the numerous authorities which the laudable industry of the plaintiff's counsel has brought to our notice, I have not found one which goes the length of holding that an action can be maintained in a case like this. The cases cited that come nearest the present are perhaps those in which it has been held that a town or city is liable for a private damage caused by neglect to perform a public duty growing out of the grant of some special power. But those cases cannot be regarded as authorities in point, because they appear to have been decided upon a distinction between the exercise of such special powers, and the exercise of the general powers which belong to all towns as mere public and political divisions of the country, and upon the ground that the special powers thus granted to the individual town or city were in the nature of privileges accepted upon the implied condition of performing the public duties growing out of them. On the other hand, there is a great weight of authority to show that towns in New-England are not liable to a civil action in a case like this.

In *Riddle* v. *The Locks and Canals*, 7 Mass. 169, 187, the case of *Russell* v. *The Men of Devon*, 2 T. R. 667, is cited as an authority applicable to towns and counties in Massachusetts; and in *Mower* v. *Leicester*, 9 Mass. 250, it was held that towns are not liable to a civil action for neglect to perform public duties imposed on them, unless the action were given by some statute, and *Russell* v. *The Men of Devon* was again recognized as applicable to the case of towns. *The Merchants' Bank* v. *Cook*, 4 Pick. 114; *Tisdale* v. *Norton*, 8 Met. 292; *Holman* v. *Townsend*, 13 Met. 300, and *Brady* v. *Lowell*, 3 Cushing 124, are to the same point.

In *Adams* v. *Wiscasset Bank*, 1 Greenl. 361, *Mellen*, C. J., cites from *Riddle* v. *The Locks and Canals* the remarks of C. J. *Parsons* on this subject, and adds, "No private action, unless given by statute, lies against *quasi* corporations for breach of a corporate duty." And other cases in Maine would seem to show that the rule as above stated is well established in that State. *Hooper* v. *Emery*, 14 Maine 377; *Reed* v. *Belfast*, 20 Maine 248; *Sanford* v. *Augusta*, 32 Maine 536.

We understand the same rule to prevail in Vermont. In *Baxter* v. *The Winooski Turnpike*, 22 Vt. 123, *Bennet*, J., in delivering the opinion of the court, says, "I take it to be well settled that if the statute had not given the action, no individual who had sustained a special damage through neglect of the town to repair their roads, could maintain a suit. It may be said that where an individual sustains an injury by the neglect or default of another, the law gives a remedy; but that principle does not apply where the public are concerned." And the same general doctrine is affirmed in *Hyde* v. *Jamaica*, 27 Vt. 443.

In Connecticut it is held that no action will lie for injuries caused by defects in a highway, unless given by statute. *Chedsey* v. *Canton*, 17 Conn. 475.

In *Farnum* v. *Concord*, 2 N. H. 392, *Richardson*, C. J., says, "No action lies at common law against towns for damages sustained through defects in highways." He cites, as authorities for his position, *Mower* v. *Leicester*, and *Russell* v. *The Men of Devon*, and, after quoting the provision of our statute which gives an action for special damages caused by insufficiency of highways, he adds, "And the question is, whether any damage has happened to the plaintiff in this case by means of the insufficiency or want of repairs of the highway in question, within the intent and meaning of this statute." The right to recover against the town is thus placed entirely on the statute.

It is said in argument that the authority of these New-England cases is much weakened by the circumstance that they may all be referred for their origin to *Russell* v. *The Men of Devon*, and that the reasons assigned for the decision in that case are not applicable to our towns. There is certainly no such exact resemblance between counties in England and our towns, as will make all the reasons upon which the court in that case placed their decision applicable to towns in this State. Counties in England are, however, territorial and political divisions of the country, as counties and towns are here; they are *quasi* corporations, so far as to be liable to public prosecution for neglect to perform their public duties; and the reason that the county had no corporate fund out of which the plaintiff's judgment could be paid, would seem to be as strong against maintaining an indictment as a civil action; for it is not easy to see how the want of a corporate fund would make it more difficult to collect a judgment recovered by an individual, than to levy a fine assessed after conviction on an indictment. That is indeed admitted in the judgment of the court, and the liability of a county to indictment put on the ground of authority and unbroken usage. And the doctrine of that case has been adopted and applied to towns in numerous instances, by judges who must certainly be reckoned among the most eminent jurists that New-England has produced: by *Parsons* and *Shaw* in Massachusetts, by *Mellen* and *Shepley* in Maine, and by our own learned and excellent Chief Justice *Richardson*, in this State; names which carry with them an irresistible

weight of authority on all legal questions, and especially on one like the present; for no men in the country have been more familiarly acquainted with the whole legal history of towns in New-England, and all the traditions of the law in relation to them.

A manuscript case of *Wheeler* v. *Troy* has been shown to us, in which it is understood to have been decided, in December, 1848, at the term of the Superior Court for Cheshire county, that towns in this State are liable to an action for damages caused by defect of highways, independent of the statute which gives the action. Taking that case to be correctly reported and to have been correctly decided, it is far from coming up to the present. The duty to repair highways is especially enjoined upon towns by statute, for the common benefit of all who have occasion to use them. It is not a public duty, supposed to be devolved upon towns to enable their own citizens to exercise and enjoy their public and political rights, like that on which the plaintiff relies in this case.

We find, however, upon inquiry, that this case of *Wheeler* v. *Troy* was decided by two only of the three judges then on the bench, in the absence of Mr. Justice *Woods*, whose opinion on a question of this kind would have added great weight to the authority of the case; and we have no information that he then concurred or now concurs in the decision. The case has remained long without any published report, and has received no confirmation from recognition in any subsequent decision, or from the acquiescence of the legal profession; and, indeed, the manuscript report of the case fails to afford evidence that it was decided after so careful and thorough a consideration as was usual with that court; and, if an occasion should hereafter arise to require it, we should feel quite at liberty to reverse the decision; but we do not find ourselves called on to do it at this time.

A distinction has been suggested in argument, between an omission or total neglect to perform a public duty, and negligence in the manner of performing it. It has been contended that though the town might not be liable for damages caused by omission to perform the duty, they would be for an injury caused by the negligent and improper manner of performing it. There are doubtless cases where a party who is under no legal obligation to perform an act or service, is yet liable for damages caused by his negligence, if he voluntarily enters upon the performance of it. But our discussion of this case has gone on the assumption that it was the duty of the town to provide a safe and suitable place for holding the town-meeting; and we are unable to perceive any distinction in principle between a claim to recover damages for a total neglect to perform an admitted public duty, and for neglect to perform it properly and with due care, when the injury complained of happens to the plaintiff in the exercise of his public rights as a citizen of the town. The duty is not performed unless it is properly performed. In both cases the town has neglected to perform, or failed to perform, the public duty which they owed to the plaintiff and other citizens.

We see no reason to question the authority of towns to build and own town-houses, to be used for holding town-meetings and other public purposes. But it by no means follows as a necessary consequence that it is the duty of towns to provide houses of their own for such purposes. And even where the town is provided with a town-house, we are not required, in the view which we take of this case, to say whether the duty to see that the house is in proper order for public use rests on the town in a corporate capacity, or on the officers of the town. There is no statute that requires town meetings to be held at the town-house, even in cases where the town owns such a building. On the contrary, the warrant of the selectmen notifying the meeting is by the statute "to prescribe the place." If the town-house were known at the time to be in an unsafe condition, it would hardly be contended that their duty would require the selectmen to notify the meeting to be held there. It may perhaps be found, when the question shall be considered, that it belongs to the town officers, and not to the town in a corporate capacity, to see that the town meetings are held in a safe and suitable place.

We regard the present case as one of new impression. We have heard of no earlier attempt in this State to maintain an action against a town, for a private injury suffered by a citizen of the town from neglect of the town to provide him with safe and suitable means of exercising his public rights, and we are not informed of any case in which such an action has been maintained in any other State. We believe it to have been the general understanding of the profession in this State, that an action will not lie against a town for neglect to perform a mere public duty, unless the action is given by statute. The authorities cited in support of the plaintiff's action are very distinguishable, as we think, from the present case, and there is a great weight of authority on the other side.

Our conclusion is, that this action, on the case stated to us, cannot be maintained.

THAYER *v.* CITY OF BOSTON.

1837. 19 *Pickering* (*Massachusetts*), 510.[1]

The declaration alleged, in substance, that the plaintiffs were owners of a messuage abutting on a public way, which way the plaintiffs, by reason of their ownership of the messuage, had a right to enjoy; that the defendants took up the pavement in front of the messuage and buildings, dug up the soil, and erected stalls and benches on the passage way; and that the defendants by these acts obstructed the access to the messuage, and also obscured and darkened it, thus causing special damage to the plaintiffs.

[1] Statement abridged. Citations of counsel and portions of opinion omitted. — Ed.

Plea, the general issue.

It appeared at the trial, that the removal of the pavement &c. and the depositing of the earth, &c. in front of the plaintiffs' messuage, were acts done by officers of the city, having authority over streets and public lands, and claiming to act by authority of their office, and that the persons employed were paid from the city treasury; and that the erection of the stalls, booths, &c. and the occupation of the land in front of the plaintiffs' messuage, were by persons under permission from officers of the city, claiming authority as such; and that the city received rent therefor, claiming title to the *locus* in fee.

The defendants objected that this action could not be maintained against them for any of the acts alleged to have been done in the public street in question, because they were performed, not by the city, but by the surveyors of highways and other officers duly authorized by law; and if the officers were not so authorized, they, and not the city, were responsible for their unlawful acts; that the corporation could not be made answerable for any unauthorized trespasses of its officers, and that in fact it was incapable of committing a trespass. But for the purposes of the trial it was ruled, that the defendants were responsible for the acts of the officers of the city.

Verdict for plaintiffs.

J. Pickering and *C. P. Curtis*, for defendants.

Metcalf and *C. G. Loring*, for plaintiffs.

Shaw, C. J. . . . The action is an action of the case against the city in its corporate capacity, for special damage, alleged to have been done to the plaintiffs, in their estates, by the officers of the city, having authority over the streets and highways of the city, by acts which they professed to do by virtue of their offices, and for the use and benefit of the city.

It is a well settled rule of law, that if an individual suffer special damage, by any unlawful act, in obstructing a highway, he shall have his action although the party doing the act is liable to an indictment.

. . . . . .

Supposing this to be a public highway, and the plaintiffs to have sustained a special damage, so as to enable them, upon general principles, to maintain an action, then it is argued that such an action, sounding in tort, cannot be maintained against the city, in its corporate capacity; and whether such action can be maintained, is the question which has been mainly considered in the present case.

The argument strongly pressed by the defendants is, that if the officers of the corporation, within their respective spheres, act lawfully and within the scope of their authority, their acts must be deemed justifiable, and nobody is liable for damages, and if any individual sustains loss by the exercise of such lawful authority, it is *damnum absque injuriâ*. But if they do not act within the scope of their authority, they act in a manner which the corporation have not author-

ized, and in that case the officers are personally responsible for such unlawful and unauthorized acts.

But the Court are of opinion that this argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results.

There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law. And it may be added, that it would be injurious to the city itself, in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers and subordinate persons, might well refuse to act under the directions of its government in all cases, where the act should be merely complained of, and resisted by any individual as unlawful, on whatever weak pretence; and conformably to the principle relied on, no obligation of indemnity could avail them.

The Court are therefore of opinion, that the city of Boston may be liable in an action of the case, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government, invested with jurisdiction to act for the corporation, upon the subject to which the particular act relates, or where after the act has been done, it has been ratified, by the corporation, by any similar act of its officers.

That an action sounding in tort, will lie against a corporation, though formerly doubted, seems now too well settled to be questioned. *Yarborough* v. *Bank of England*, 16 East, 6; *Smith* v. *Birmingham &c. Gas Light Co.*, 1 Adolph. & Ellis, 526. And there seems no sufficient ground for a distinction in this respect, between cities and towns and other corporations. *Clark* v. *Washington*, 12 Wheaton, 40; *Baker* v. *Boston*, 12 Pick. 184.

Whether a particular act, operating injuriously to an individual, was

authorized by the city, by any previous delegation of power, general or special, or by any subsequent adoption and ratification of particular acts, is a question of fact, to be left to a jury, to be decided by all the evidence in the case. As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii;* it must further appear, that they were expressly authorized to do the acts, by the city government, or that they were done *bonâ fide* in pursuance of a general authority to act for the city, on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation. As the evidence was not submitted to the jury in the present case, and the fact does not appear, but it is only found that the acts complained of, were done by officers of the city, the Court are of opinion that the verdict must be set aside and a new trial granted.

SHAW, C. J., IN ANTHONY *v.* INHABITANTS OF ADAMS.

1840. 1 *Metcalf* (*Massachusetts*), 284, pp. 285, 286.

One question discussed was, whether an action sounding in tort would lie against a municipal corporation. We can have no doubt, that an action upon the case will lie against municipal corporations, when such corporations are in the execution of powers conferred on them, or in the performance of duties required of them by law, and their officers, servants and agents, shall perform their acts so carelessly, unskilfully or improperly, as to cause damage to others. This falls within the very general principle, that the superior or employer shall be answerable *civiliter* for the mismanagement and negligence of the agent employed by him, by which another is damnified. *Sutton* v. *Clarke*, 6 Taunt. 29. And although such action sounds in tort, to mark the distinction between this and an action upon contract; yet the true view of considering it, is that of a legal liability to indemnify another against negligence of one for whom the law holds him responsible. It implies no wilful act, or intended wrong, and, therefore, requiring no vote or corporate act to create the liability, it may as well lie against a corporation as an individual person. We think it stands on the same footing on which it is now held, both in this country and in England, contrary to the ancient notions on that subject, that corporations may be liable on implied promises raised by law from their legal liabilities. *Gray* v. *Portland Bank*, 3 Mass. 364. *Bank of Columbia* v. *Patterson*, 7 Cranch, 299. *Clark* v. *Mayor, &c. of Washington*, 12 Wheat. 40. *Beverley* v. *Lincoln Gas Light Band Coke Co.*, 6 Adolph. & Ellis, 829. But where individuals, although professing to act under color of authority from municipal corporations, do acts which are injurious to others, if the objects and purposes which they propose to accomplish, are not within the scope of the corporate

powers of towns, and not done in the execution of any corporate duty imposed upon the town by law, the town is not liable for the damages occasioned by such acts. Were it otherwise, towns might be rendered responsible upon implied liabilities, in cases where they could not bind themselves, as a corporation, by an express vote of the inhabitants. For, it is now well settled that a town, in its corporate capacity, will not be bound, even by the express vote of a majority, to the performance of contracts, or other legal duties not coming within the scope of the objects and purposes for which they are incorporated. *Stetson* v. *Kempton*, 13 Mass. 272. *Norton* v. *Mansfield*, 16 Mass. 48. *Parsons* v. *Goshen*, 11 Pick. 396.

Looking at the declaration in the present case, it is not shown that the town was under any obligation, in its corporate capacity, to erect and build this highway, or that the dam complained of was a part of the highway, or that the damage complained of resulted from the negligence of the agents and officers of the town, in the performance of any corporate duty. The court are, therefore, of opinion that the action cannot be maintained.

MILES *v.* CITY OF WORCESTER.

1891. 154 *Mass.* 511.[1]

Tort for damages occasioned by an encroachment upon the plaintiff's land of a wall erected between the same and an adjoining lot belonging to the defendant city.

There was evidence that about the year 1871, the city built a wall on the south side of its high school lot between it and the plaintiff's lot, which were then at the same grade, upon a line mutually agreed upon, and proceeded to fill up its land to a level as high as the top of the wall, or even higher; that the wall since it was built had been pressed out of position by reason of the weight of the filling behind it, or by the action of surface water or frost, so that for nearly or quite a foot at the bottom it had bulged out and come upon the plaintiff's land; and that this bulging out of the wall had increased within six years before the date of the writ, and had gradually affected the plaintiff's estate.

The judge instructed the jury, in substance, that if the plaintiff by reason of the encroachment of the wall had been kept out of possession and occupation of a part of his land, and if within six years before the date of the writ the city had allowed or suffered the wall to be pushed and crowded upon the plaintiff's land, creating a nuisance thereto, causing him special and peculiar damage, then there was a

[1] Statement abridged. — Ed.

liability in an action of tort as for a nuisance, no other objection existing to a recovery.

Verdict for plaintiff. Defendant excepted.

F. P. Goulding, for defendant.

W. S. B. Hopkins (*F. B. Smith* with him), for the plaintiff.

ALLEN, J. It is obvious that the defendant's wall, in its present position upon the plaintiff's land, must be deemed an actionable nuisance, unless the defendant can claim exemption from responsibility on some special ground. *Codman* v. *Evans*, 7 Allen, 431. *Nichols* v. *Boston*, 98 Mass. 39, 43. *Fay* v. *Prentice*, 1 C. B. 828. The defendant suggests that it is not liable, because the wall was built and maintained solely for the public use, and with the sole view to the general benefit and under the requirement of general laws; and that the case cannot be distinguished in principle from the line of cases beginning with *Hill* v. *Boston*, 122 Mass. 344, and ending with *Howard* v. *Worcester*, 153 Mass. 426. We are not aware, however, that it has ever been held that a private nuisance to property can be justified or excused on that ground. The verdict shows a continuous occupation of the plaintiff's land by the encroachment of the defendant's wall. The question of negligence in the building of the wall is not material. The erection was completed, and was accepted by the defendant, and is now in the defendant's sole charge; and if it is a nuisance, the defendant is responsible. *Staple* v. *Spring*, 10 Mass. 72, 74. *Nichols* v. *Boston*, 98 Mass. 39. Such an occupation of the plaintiff's land cannot be excused for the reasons assigned. A city cannot enlarge its school grounds by taking in the land of an adjoining owner by means of a wall or fence. The public use and the general benefit will not justify such a nuisance to the property of another. If more land is needed, it must be taken in the regular way, and compensation paid, but if, by the action of the elements or otherwise, without the plaintiff's fault, the defendant's wall comes upon the plaintiff's land and continues there, it becomes a nuisance for which the defendant is responsible; and so are the authorities. *Gorham* v. *Gross*, 125 Mass. 232, 239. *Khron* v. *Brock*, 144 Mass. 516. *Eastman* v. *Meredith*, 36 N. H. 284, 296. *Hay* v. *Cohoes Co.* 2 Comst. 159. *Tremain* v. *Cohoes Co.* 2 Comst. 163. *Weet* v. *Brockport*, 16 N. Y. 161, 172, *note*. *St. Peter* v. *Denison*, 58 N. Y. 416, 421. *Mayor & City Council of Cumberland* v. *Willison*, 50 Md. 138. *Harper* v. *Milwaukee*, 30 Wis. 365. *Pumpelly* v. *Green Bay Co.* 13 Wall. 166, 181. Dillon Mun. Corp. § 985.

The case is distinguishable from *Middlesex Co.* v. *McCue*, 149 Mass. 103, where soil from the defendant's land upon a hillside was washed into the plaintiff's mill-pond by the rains, when the defendant had built no artificial structure, and had done nothing more than to cultivate his land in the ordinary way. *Exceptions overruled.*

WORDEN *v.* CITY OF NEW BEDFORD.

1881. 131 *Massachusetts*, 23.[1]

Tort for personal injuries occasioned to the plaintiff by falling through a trap-door in a room in a public building in the defendant city, known as the City Hall.[a] Answer, a general denial. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

The case was argued at the bar, and was afterwards submitted on additional briefs, by *F. A. Milliken*, for the defendant, and *E. L. Barney*, for the plaintiff.

Morton, J. Under the instructions given them, the jury must have found that the city of New Bedford was the owner of a building known as the City Hall, used for the ordinary municipal purposes; that it had been accustomed to let it, for profit, for lectures, exhibitions, amusements and other like purposes, having no relation to municipal affairs or interests; that at the time the injury happened to the plaintiff it had, acting by its committee on public property, let the hall and a smaller room adjoining, for profit, to the Southern Massachusetts Poultry Association; that the sum paid by the association included compensation for the lighting and heating the rooms and for the services of the janitor, who, by appointment of the city, had the care of the building; that the plaintiff was injured solely by the carelessness of the janitor, while doing acts in the lighting and heating of the rooms; and that the plaintiff was rightfully in the rooms and using due care when he received the injury. These facts are sufficient to establish the liability of the city.

A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation.

But when a city or town does not devote such building exclusively to municipal uses, but lets it or a part of it for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be. *Oliver* v. *Worcester*, 102 Mass. 489. *Hill* v. *Boston*, 122 Mass. 344.

But the defendant contends that a city or town has no power to let its public buildings for private uses, that the letting to the poultry association, if made by the city, was *ultra vires*, and therefore it is not

[1] Only so much of the opinion is given as relates to a single point. — Ed.

liable. This ground is untenable. The city could not erect buildings for business or speculative purposes, but having a city hall, built in good faith and used for municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for a compensation. Such a use is within its legal authority, and is common in most of our cities and towns. *French* v. *Quincy*, 3 Allen, 9.

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We are therefore of opinion that, upon the facts proved in this case, the defendant was liable; it was dealing with the city hall, not in the discharge of a public duty, but for its own benefit and gain in a private enterprise, in the same way as a private owner might, and was liable for negligence in the management of the property to the same extent as such private owner would be. *Exceptions overruled.*

MILLS *v.* CITY OF BROOKLYN.

1865. 32 *New York*, 489.[1]

Denio, C. J. . . . The grievance of which the plaintiffs complain, is that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of a certain capacity was built, but it was insufficient to carry off all the water which came down in a rain storm, and the plaintiffs' premises were, to a certain extent, unprotected. Their condition was certainly no worse than it would have been if no sewer at all had been constructed. So far as the one laid down operated, it relieved the plaintiffs' lot; but the relief was not adequate. If the defendants would have been liable if they had done nothing, they are of course liable for the insufficient character of the work which was constructed.

But it is not the law that a municipal corporation is responsible in a private action for not providing sufficient sewerage for every, or for any part of the city or village. The duty of draining the streets and avenues of a city or village, is one requiring the exercise of deliberation, judgment and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice between citizens; but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of the order of time in which improvements shall be made. It involves, also, a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality may claim over

[1] Statement and arguments omitted; also portions of opinion. — Ed.

another. If the owner of property may prosecute the corporation on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury, and thus the judgment which the law has committed to the city council, or to an administrative board, will have to be exercised by the judicial tribunals. The court and jury would have to act upon a partial view of the question, for it would be impossible that all the varied considerations which might bear upon it could be brought to their attention in the course of a single trial. Such a system of law would be as vexatious in practice as it is unwarranted in law. It has been frequently invoked, but never, I believe, with success.

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It may, therefore, be laid down as a very clear proposition, that if no sewer had been constructed at the locality referred to, an action would not lie against the corporation, though the jury should find that one was necessary, and that the defendants were guilty of a dereliction of duty in not having constructed one.

But the defendants put down a sewer which was insufficient to carry off all the surface water which fell during a violent shower. There was no want of skill in constructing it; simply it was not sufficiently large. The evidence was that it could not have been made larger on account of the grade and size of the system of sewers with which it connected, and through which the water had to be carried off. The evidence as to this was entirely uncontradicted; and there was nothing intrinsically improbable in the assertion. Unless the defendants were responsible for the want of judgment upon which that system was devised, I do not see why this evidence was not a complete answer to the action; and that they were not responsible for that, follows from what has already been said. Very many considerations besides the protection of the land upon which the plaintiffs' house was erected, no doubt entered into the question when that system was determined upon. It is inferable from the evidence that the plaintiffs' land was then vacant and unimproved, and that the adjacent streets had not been graded. While that state of things existed it was seen that the surface water was absorbed by the earth, and injured no one. No doubt public improvements, in a growing town, ought to be made with a certain reference to anticipated changes. But it would require a degree of wisdom and foresight not usually met with in public officers, to adjust and apply the expenditures for public purposes so perfectly that no deficiency or redundancy would ever be found to exist. It is a wise provision of the law that an action for damages does not lie for such errors of judgment on the part of the agents of the public.

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[Certain authorities referred to] are all cases where the injury was either the result of suffering a municipal work to be out of repair, or where the defendants had done acts which were in themselves positive nuisances. They furnish no ground for holding a municipal corpora-

tion responsible for not providing suitable sewerage, whether the neglect was total, or partial only, arising from the insufficiency of a sewer to discharge all the water which it was intended to carry off.

The questions in this case were raised by the motion to dismiss, on account of the insufficiency of the complaint, which did not, according to the foregoing views, set forth a cause of action, and by one of the points taken at the close of the trial.

I am in favor of reversing the judgment of the Supreme Court [which was in favor of plaintiff], and ordering a new trial.

Judgment reversed and new trial ordered.

BARTON *v.* CITY OF SYRACUSE.

1867. 36 *New York*, 54.

BOCKES, J. This is an action on the case for negligence, in which the defendant is charged with culpability in omitting to keep a sewer in proper repair, and in suffering it to become filled with dirt and rubbish, by reason of which the flow of the water was impeded, causing it to set back through the plaintiff's drain into his cellar, to the injury of his property.

The referee, to whom the case was referred to hear and determine, directed judgment for the plaintiff, which judgment was affirmed at General Term.

By the city charter, the mayor and common council were authorized and directed to construct sewers through the city, and to keep them in repair. They accepted and entered upon the performance of this duty, and constructed sewers along such of the streets as were deemed appropriate, with a view to favorable and healthful drainage. The expenses were assessed upon the property benefited, as provided by the charter, and their supervision and control were properly assumed by the city government. Under this condition of authority and duty, the municipal corporation were bound, through the proper officers, to a faithful and prudent exercise of power, and carelessness and negligence in that regard created a liability, which might be enforced by any one suffering damages therefrom. So the law is firmly established, that in constructing sewers, and in keeping them in repair, a municipal corporation acts ministerially, and, having the authority to do the act, is bound to the exercise of needful prudence, watchfulness and care. The authorities in support of these principles are too numerous and familiar to require particular comment.

[Remainder of opinion omitted.]

Judgment affirmed

ASHLEY *v.* CITY OF PORT HURON.

1877. 35 *Michigan*, 296.[1]

Cooley, C. J. The action in this case was instituted to recover damages for an injury caused to the house of the plaintiff by the cutting of a sewer under the direction of the city authorities, and under city legislation, the validity of which is not disputed. The necessary result of cutting the sewer, the plaintiff claims, was, to collect and throw large quantities of water upon his premises which otherwise would not have flowed upon them; and it is for an injury thereby caused that he sues. The evidence offered on the part of the plaintiff tended to establish the case he declared upon, but the court instructed the jury that though they should find the facts to be as the plaintiff claimed, they must still return a verdict for the defendant. The ground of this decision, as we understand it, was, that the city, in ordering the construction of the sewer and in constructing it, was acting in the exercise of its legislative and discretionary authority, and was consequently exempt from any liability to persons who might happen to be injured. That is the ground that is assumed by counsel for the city in this court, and it is supposed to be the ground on which the case was decided in the court below.

In *Pontiac v. Carter*, 32 *Mich.*, 164, the question of the liability of a municipal corporation for an injury resulting from an exercise of its legislative powers was considered, and it was denied that any liability could arise so long as the corporation confined itself within the limits of its jurisdiction. That was a case of an incidental injury to property caused by the grading of a street. The plaintiff's premises were in no way invaded, but they were rendered less valuable by the grading, and there was this peculiar hardship in the case, that the injury was mainly or wholly owing to the fact that the plaintiff's dwelling had been erected with reference to a grade previously established and now changed. In the subsequent case of *City of Detroit v. Beckman*, 34 *Mich.*, 125, the same doctrine was reaffirmed. That was a case of injury by being overturned in a street in consequence of what was claimed to be an insufficient covering of a sewer at a point where two streets crossed each other. It was counted upon as a case of negligence, but the negligence consisted only in this, that the city had failed to provide for covering the sewer at the crossing of a street for such a width as a proper regard for the safety of people passing along the street would require. If this case is found to be within the principle of the cases referred to, the ruling below must be sustained, and that, we think, is the only question we have occasion to discuss.

The cases that bear upon the precise point now involved are numerous.

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[1] Citations of counsel omitted. — Ed.

In *Rochester White Lead Co. v. Rochester*, 3 *N. Y.*, 463, the city was made to respond in damages for flooding private premises with waters gathered in a sewer. This case is commented on in *Mills v. Brooklyn*, 32 *N. Y.*, 489, and distinguished from one in which the injury complained of arose from the insufficiency of a sewer which was constructed in accordance with the plan determined upon. Obviously the complaint in that case was of the legislation itself, and of incidental injuries which it did not sufficiently provide against. The like injuries might result from a failure to construct any sewer whatever; but clearly no action could be sustained for a mere neglect to exercise a discretionary authority. — Compare *Smith v. Mayor, etc.*, 6 *N. Y. Sup. Ct.* (*T. & C.*), 685; 4 *Hun*, 637; *Nims v. Mayor, etc.*, 59 *N. Y.*, 500. Cases of flooding lands by neglect to keep sewers in repair, of which *Barton v. Syracuse*, 37 *Barb.*, 292, and 36 *N. Y.*, 54, is an instance, are passed by, inasmuch as it is not disputed by counsel for the defendant in this case that for negligent injuries of that description the corporation would be responsible. Those cases are supposed by counsel to be distinguished from the one before us in this: that here the neglect complained of was only of a failure to exercise a legislative function, and thereby provide the means for carrying off the water which the sewer threw upon the plaintiff's premises. The distinction is, that the obligation to establish and open sewers is a legislative duty, while the obligation to keep them in repair is ministerial. But it is not strictly the failure to construct sewers to carry off the water that is complained of in this case; it is of the positive act of casting water upon the plaintiff's premises by the sewer already constructed.

[After citing cases where an action like the present was sustained.]

It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other. — *Pumpelly v. Green Bay Co.*, 13

Wall., 166; *Arimond v. Green Bay, etc., Co.*, 31 *Wis.*, 316; *Eaton v. B. C. & M. R. R. Co.*, 51 *N. H.*, 504.

A like excess of jurisdiction appears when in the exercise of its powers a municipal corporation creates a nuisance to the injury of an individual. The doctrine of liability in such cases is familiar and was acted upon in *Pennoyer v. Saginaw*, 8 *Mich.*, 534.

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Judgment reversed. New trial ordered.

LAWRENCE, J., IN NEVINS *v.* CITY OF PEORIA.

1866. 41 *Illinois*, 502, *pp.* 508, 509, 511, 512, 515.

LAWRENCE, J. . . . The city is the owner of the streets, and the legislature has given it power to grade them. But it has no more power over them than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without being responsible itself. Neither State nor municipal government can take private property for public use without due compensation, and this benign provision of our Constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree. We can solve more easily and safely questions of this character if we take pains to free our minds from the false notion that a municipality has some indefinable element of sovereign power which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person.

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It is said that the city must grade streets and direct the flow of waters as best as it can for the interests of the public. Undoubtedly, but if the public interest requires that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part, in this process of grading or drainage, why should not the public pay for it to the extent to which it deprives the owner of its legitimate use? Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street? Surely the question of the degree to which the property is taken can make no difference in the application of the principle. To the extent to which the owner is deprived of its legitimate use and as its value is impaired, to that extent he should be paid.

There is much conflict of authority upon this question, and those courts which have taken a view different from our own, rest their conclusions in part upon the doctrine of public necessity, and the impor-

tance of preserving unimpaired, for purposes of public improvement, the efficiency of municipal corporations. In our opinion, the theory that private rights are ever to be sacrificed to public convenience or necessity, without full compensation, is fraught with danger, and should find no lodgment in American jurisprudence. To prevent this was the object of some of the most important of our constitutional guaranties. The property of the majority who control the government is in no peril; it is that of a feeble minority which is in danger, and whenever that is sought to be taken in a time of peace, under pretense of public necessity or convenience, the owner must find protection in the courts, or our institutions have failed of their great purpose — the complete security of private rights. It is undoubtedly important, as urged in the argument, that our cities should improve rapidly, and be able to carry onward large systems of drainage and grading, but, in the attainment of these ends, they cannot be permitted to sacrifice the property of the humblest citizen without compensation. Neither is it true that the rule we lay down will interfere with the growth of cities, as the expense of grading is not very largely increased by the construction of proper gutters and culverts for the flow of water.

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Thus the cases divide themselves into two classes, one, and the larger class, holding that a city is only held to reasonable care and skill in grading its streets, and that if these are used, it can shield itself under its corporate powers from liability to individuals, the other holding that a city in the management of corporate property must be held to the same responsibilities that attach to individuals for injury to the property of others. We cannot doubt that the latter is the sounder rule. We are unable to see why the property of an individual should be sacrificed for the public convenience without compensation. We do not think it sufficient to call it *damnum absque injuria*. We know our Constitution was designed to prevent these wrongs. We are of opinion, that, for injuries done to the property of the appellant in the case before us, (1) by turning a stream of mud and water upon his premises, or (2) by creating in the immediate neighborhood of his dwelling an offensive and unwholesome pond, if the jury find these things to have been done, the city of Peoria must respond in damages.

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We . . . have adopted a peculiar rule as regards "taking," holding that no actual physical contact is necessary to constitute a "taking" within meaning of const. This explains why the creation of the stagnant pool was held to be a "taking." Following cases

KEASY *v.* CITY OF LOUISVILLE.

1836. 4 *Dana* (*Kentucky*), 154.

From the Circuit Court for Jefferson County.

Nicholas, for plaintiff.

Guthrie, for defendant.

Robertson, C. J. Daniel Keasy, owning a lot on Jefferson street, in Louisville, on which he had erected a small wooden house, since that street had been graded and paved, under the charter of incorporation of 1828 — sued the city, in an action on the case, for elevating the grade about three feet above the level of his lot, after he had thus improved it, correspondently with the first grade, in consequence of which he had, as he avers, to fill up his lot and reconstruct his house, and had been, in other respects, subjected to inconvenience and damage.

The facts, as alleged, having been proved on the trial, on the general issue, the court instructed the jury that, if they should believe, "from all the evidence, that the Mayor and councilmen of the city of Louisville had the street filled or raised for the purpose of carrying off the water in that part of the city, and the injury complained of arose from filling or raising, they ought to find for the defendant."

Verdict and judgment were accordingly rendered in bar of the action. And it is that judgment which the plaintiff in error now seeks to reverse.

The constitutional power to incorporate the citizens of Louisville into a *municipal* body politic, possessing, as every artificial as well as natural being ought to possess, a self-will and the faculty of acting, of regulating its own affairs, and of governing its constituent members, as far as may be consistent with its charter, the federal and state constitutions and the general laws of the Commonwealth, and as may be proper for effectuating the legitimate ends of its creation, has been conceded by the plaintiff in error, in the fact of suing the corporation, and has, also, been necessarily presupposed by the Circuit Judge, in giving his hypothetical instruction to find for the *City* as defendant. And, not doubting either the power of incorporating the city, or the incidental corporate right, either inherent, or derived from legislative authorization, to grade and pave the streets of the city, we are, also, of the opinion, that the corporation had authority to regrade and pave Jefferson street, or any other street, whenever the municipality might have deemed such an improvement useful to the local public.

The power of the Commonwealth over the streets, as well as over the local police, having been, not *alienated*, but delegated, or rather *deferred*, to the city itself, it was not material to the legal authority of the order for changing the grade of Jefferson street, that such a change was, in fact, necessary for draining water or for any other purpose. The city decided that it was proper — and personal inconvenience or

private judgment, however repugnant to the policy of re-grading, could not have affected the legal validity of the order.

But the public right to regulate the common highways of the city, is, of course, not arbitrary and unlimited: far from it. Private *rights* must be regarded. The public, like a common person, must so use its own as not to *injure* another's property. It cannot take private property for public use, without paying a just equivalent; nor can it disturb any personal *right* of enjoyment. But, without *touching* the plaintiff's lot, or in any way encroaching upon it, or interfering with any *prescriptive* right, to light, or to private way, the city had as clear and perfect authority to raise its street higher, or sink it lower, than the level of his lot, as he would undoubtedly have had to elevate or sink his ground, without touching or otherwise injuring or interfering with the public street.

On the trial of the case, there was no evidence tending, in any degree, to show, that the plaintiff's lot had been intruded on or touched; or that the elevation in the grade of the street caused water to run or remain upon it, or rendered it less salubrious, or divested him of any *vested right*, or *unjustly* obstructed the enjoyment of any such right; and mere *inconvenience*, to which, in his opinion or in fact, a public improvement in his city may have subjected him, is not sufficient *per se* to entitle him to damages. Every citizen takes and holds private property in land subject to the paramount public rights, and to the contingency of adventitious enhancement or diminution in value, resulting from the exercise of the public power for the common good, in any manner which shall not deprive him of *property*, nor disturb him in the lawful use of any thing which should, of right, be *his*. A citizen cannot be compelled to pay for private advantage arising from the location of a public way; nor, — unless his property be taken or, in some way, encroached on, so as to divest him of some exclusive individual right, — can he be entitled to damages for incidental *dis*advantage. If the city possess power to shut up Jefferson street, and should exercise it, the *reclusion* would subject the plaintiff, and others also, to much more inconvenience and actual loss than any which could have been occasioned by the elevation of the grade: but, — the power conceded, — a legal right to damages for the total obliteration of the street could not be maintained. It would have been *damnum absque injuria* — loss, not injury — *inconvenience*, not *wrong* — to which every citizen must submit, and to something like which every citizen does submit, for the public good.

As to the legality or propriety of some of the modes of making public improvements in the city of Louisville, this Court has no right to give any opinion in this case. The means employed for effecting an allowable end may be inappropriate, or even unauthorized, but the end itself — when accomplished — is not therefore the less unexceptionable. Jefferson street has been re-graded — by what instrumentality is not here material; the end was lawful; the city had a right to effect it in some

mode; and having done so, without injury to any of the plaintiff's private rights, (as we are bound to presume from this record,) he has no legal title to demand any damages for an accidental consequence, arising from the rightful exercise of a public power, without any tortious, or negligent, or unjust act or omission.

We have not said, nor can we say, that a citizen may not be entitled to damages for a *deprivation of the use* of his property by a public way which may not take, or even touch, any of his land. But the case in which such a right to damages might be recognised, must be an extreme and peculiar one. And this is not such an one, but is an ordinary case occurring, in a greater or less degree, frequently — almost constantly; and the public could not well bear the heavy and vexatious burden of such demands as would forever arise from such cases, were they admitted to be cases of private injury, for which an action could be maintained. Nor could individual citizens be justly subjected to the *reciprocal* claims of the public against *them*, for the like inconvenience arising from their *lawful use* and enjoyment of nothing but their own private property. And hence, as a general rule, the law gives no damages to either party, when there has been no *trespass*, nor any nuisance which might have been avoided without a surrender of a just and necessary right.

If, as we have supposed and decided, the city had authority to change the first grade, there could have been no implied agreement, when that was fixed, that it would never be changed, any more than such an agreement, between the United States and the owners of land on the Cumberland Road, never to change the location or grade of that national way, could be deemed as having been implied.

Wherefore, it seems to us, that the plaintiff altogether failed to prove any fact from which the jury would have had a right to infer, that he had a legal right to damages. And therefore, it is our opinion that, however unnecessary or inappropriate the hypothetical assumptions of the Court may be deemed to have been, the instruction was not erroneous to the plaintiff's prejudice — and the judgment consequently must remain unreversed.[1]

[1] The absence of municipal liability at common law, in cases like *Keasy* v. *Louisville*, has been affirmed by the courts in most of the states. (For the exceptional decisions *contra* in Ohio, see *McCombs* v. *Akron Council*, 15 Ohio, 474; s. c. 18 Ohio, 229; *Crawford* v. *Village of Delaware*, 7 Ohio State, 459; and other cases reviewed in Lewis on Eminent Domain, s. 98.) 2 Dillon, Mun. Corp., 4th ed., s. 990. Statutes, however, have been enacted in some states giving compensation for damages to abutting property by change of grade. These statutes and the decisions thereunder are reviewed in Lewis on Eminent Domain, ss. 207–218; and late decisions are collected in 6 Lewis, Am. R. R. & Corp. Reports, p. 257, note. Some modern constitutions provide that compensation shall be made, not only for property *taken* for public use, but also for property *damaged* or *injured*. Under such provisions it has been held that the abutting owner may recover for damage to his property by a change in the grade of the street. See 2 Lewis, Am. R. R. & Corp. Rep. p. 435, note; 6 Ibid., p. 257, note; and compare 2 Dillon, Mun. Corp., 4th ed., ss. 995 *a*, 995 *b*, and 995 *c*. — Ed.

BUTTRICK *v.* CITY OF LOWELL.

1861. 1 *Allen (Massachusetts)*, 172.[1]

TORT for an assault and battery.

A city ordinance provides, that "three or more persons shall not stand together or near each other in any street in the city in such manner as to obstruct a free passage therein for passengers." While the plaintiff was standing peaceably, and talking with only one other person, upon the sidewalk, and interrupting no one in the proper use of the same, two police officers of the city of Lowell ordered him off, and, upon his refusing to go, assaulted, arrested, and imprisoned him; claiming that by so doing they were only performing their official duty. The plaintiff brought an action of tort against the policemen for false arrest and assault and battery. The policemen attempted to justify their proceeding under the above city ordinance. The plaintiff recovered judgment against the policemen for $500; which judgment remains unsatisfied. The city of Lowell authorized its solicitor to appear in the defence of said suit, and paid him for trying the same. The plaintiff now brings the present action against the city, to recover damages for said assault by the police officers.

Upon an agreed statement, setting forth substantially the foregoing facts, a nonsuit was ordered. Plaintiff appealed.

B. F. Butler, for the plaintiff. The rule regulating the liability of a municipal corporation seems to be this: (1.) no liability exists for the negligence of public officers over whom it has no control save in their appointment; (2.) liability does exist, under the doctrine of *respondeat superior*, in all cases in which the servant is in the direct execution of a trust or order of the city or town, within the scope of its authority, or upon any matter upon which it may make by-laws. *Cushing* v. *Stoughton*, 6 Cush. 389. *Thayer* v. *Boston*, 19 Pick. 511. *Perry* v. *Worcester*, 6 Gray, 544.

T. H. Sweetser, for the defendant.

BIGELOW, C. J. This case must be governed by the decisions in *Hafford* v. *City of New Bedford*, 16 Gray, 297, and *Walcott* v. *Swampscott*, ante, 101. Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties the city or town cannot be held liable.

[1] Statement abridged. — ED.

Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as the agents or servants of the city.

The facts relied on in this case to show a ratification or adoption by the city of the acts of the police officers cannot have that effect. They are entirely consistent with a belief on the part of the mayor and other agents of the city that the police officers had committed no unlawful invasion of the plaintiff's rights. *Perley* v. *Georgetown*, 7 Gray, 464.

It may be added that, if the plaintiff could maintain his position that police officers are so far agents or servants of the city that the maxim *respondeat superior* would be applicable to their acts, it is clear that the facts agreed would not render the city liable in this action; because it plainly appears that, in committing the acts complained of, the officers exceeded the authority vested in them by the by-law of the city.

Judgment for the defendants.

GILBOY ET AL. *v.* CITY OF DETROIT.

Supreme Court of Michigan. December 7, 1897.[1]

GRANT, J. This is an action of tort. The declaration alleges that plaintiff kept a boarding house; that he received a boarder in the usual course of business; that said boarder had been exposed to small-pox at the Merchant's Hotel in the city of Detroit; and that through the negligence of the Board of Health said person was permitted to go at large instead of being confined; that it was the duty of the Board of Health, under the charter and ordinances of the city, to examine the person at the Merchant's Hotel, determine whether she had small-pox, and, if she had, to remove her to a pest house or hospital; that the person received into plaintiff's boarding house was taken down with small-pox while there, and he in consequence suffered loss and damage.

A demurrer was interposed and sustained by the Court.

The record presents the sole question: Is a municipality liable for the negligence of officers of the Board of Health in the performance

[1] From copy of opinion furnished by Clerk of Supreme Court. — ED.

of their duty? Counsel for the plaintiff cite no authorities to support their contention, and probably for the very good reason that none can be found. The authorities universally hold to the contrary. The universal rule is that such boards and officers are not acting for private but for public purposes; they represent the entire state through the municipality, a political division of the state; and municipalities, in the absence of express statutes fixing liability, are not liable for the negligence of such officers and boards. *Maxmilian* v. *Mayor*, 62 N. Y. 160; *Richmond* v. *Long's Admrs.*, 17 Grat. 375; *Brown* v. *Vinalhaven*, 65 Me. 402; *Barbour* v. *Ellsworth*, 67 Me. 294; *Mead* v. *New Haven*, 40 Conn. 72; *Ogg* v. *Lansing*, 35 Ia. 495; *Shelbourne* v. *Yuba*, 21 Cal. 113; *Detroit* v. *Blackeby*, 21 Mich. 84; *Hill* v. *Boston*, 122 Mass. 344; 2 Dill. Corp. sec. 965.

Brown v. *Vinalhaven* is the counterpart of this in its facts.

The rule is so clearly stated by Justice Folger in *Maxmilian* v. *Mayor* that we quote it: "There are two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for any injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user, nor for mis-user by the public agents."

Judgment affirmed.

WALCOTT *v.* INHABITANTS OF SWAMPSCOTT.

1861. 1 *Allen* (*Massachusetts*), 101.

TORT for an injury received upon a highway from a collision with a cart driven by one O'Grady, a laborer employed by a highway surveyor of Swampscott to aid in repairing a highway. At the trial in the superior court, upon the facts proved, the defendants requested the court to rule that they were not liable for the acts of O'Grady; but *Wilkinson*, J. instructed the jury that if O'Grady was driving the horse and cart with which the plaintiff came in collision, with a load of

gravel for the repair of the highway, and was employed so to do by the surveyor of the town, and the collision was caused solely by O'Grady's want of care in driving the horse and cart, the defendants were liable. A verdict was found for the plaintiff, and the defendants alleged exceptions.

J. A. Gillis, for the defendants.

J. W. Perry, (*A. B. Almon* with him,) for the plaintiff.

BIGELOW, C. J. We cannot distinguish this case from *Hafford* v. *City of New Bedford*, 16 Gray, 297. It was there held, that where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of its inhabitants or of the community, such officer cannot be regarded as the servant or agent of the town, for whose negligence or want of skill in the performance of his duties a town or city can be held liable. To the acts and conduct of an officer so appointed or elected the maxim *respondeat superior* is not applicable.

This is especially true in the case of surveyors of highways. They are elected by towns and cities, not because they are to render services for their peculiar benefit or advantage, but because this mode of appointment has been deemed expedient by the legislature in the distribution of public duties and burdens for the purposes of government, and for the good order and welfare of the community. They are, strictly speaking, public officers, clothed with certain powers and duties which are prescribed and regulated by statute. Towns cannot direct or control them in the performance of these duties; they cannot remove them from office during the term for which they are chosen; they are not amenable to towns for the manner in which they discharge the trust reposed in them by law; nor can towns exercise any right of selecting the servants or agents by whom they perform the work of repairing the highways. In the discharge of these general duties they are wholly independent of towns, and can in no sense be considered their servants or agents. It is only in certain specified cases, and under carefully guarded limitations, that they can bind towns by their acts. Rev. Sts. *c.* 25, §§ 13, 15. Gen. Sts. *c.* 44, §§ 11, 13, 14. *Sikes* v. *Hatfield*, 13 Gray, 347. It was decided by this court, in *White* v. *Phillipston*, 10 Met. 108, that the common rule of law, which makes the agent or servant liable over to his employer or master for damages sustained by him in consequence of the neglect of such agent or servant, does not apply to the acts of a surveyor of highways. The court there say he is not treated by the statute as a mere agent or servant whom the town has employed, and to whom he is responsible for neglect of duty. No one would pretend that a town would be liable for damages occasioned by the negligence or want of care of one of its inhabitants while engaged in working out the amount of his highway tax by making repairs

on the roads. And yet we cannot see why such liability would not exist if the surveyor of highways, or the persons employed by him, can render the town chargeable for acts of carelessness while employed in performing similar labor. The truth is, that in neither case does the relation of principal and agent or master and servant exist.

In the case at bar, the injury sustained by the plaintiff was not occasioned by any negligence or want of care on the part of the surveyor himself, but by the carelessness of a person employed by him to make repairs on the road. To sustain this action, therefore, it would be necessary to hold that the defendants were liable not only for the acts of a public officer, but also for those of a person in his employment whom they did not select, and in whose employment to act in their behalf they could have no voice. This would be a clear violation of the principle, that the right of selection lies at the foundation of the liability of a master for the acts of his servant. The law does not hold parties responsible for the negligence or want of skill of those over whose selection and employment they could exercise no direction or control.

Exceptions sustained.

WALDRON *v.* CITY OF HAVERHILL.

1887. 143 *Massachusetts*, 582.

TORT, for injuries occasioned to the plaintiff's real estate by reason of the operation of a stone-crusher on land of the defendant, between August 1 and October 21, 1884.

At the trial in the Superior Court, before *Mason*, J., it was admitted that the plaintiff, during the time alleged in his declaration, was in the occupation and possession of the premises described therein; and that, during said time, a stone-crusher, engine, and boiler, all of which were the property of the defendant, were operated under the direction of one Mansur, who was the superintendent of streets of the defendant city, for the purpose of crushing rocks and stones for the city, used, when so crushed, in keeping the public streets in the city in suitable order and condition for travel. The stone-crusher was situated on land of the city formerly used as a gravel pit for supplying materials to be used in repairing said streets and highways, and was, during the time alleged in the declaration, used exclusively in the preparation of materials to be used in keeping said streets and highways in repair. Said land was a short distance from the plaintiff's premises, and, by the operation of the stone-crusher, stone dust arose and was deposited on the plaintiff's premises, which were thereby damaged to the amount of $50. The men who operated the stone-crusher under the direction of Mansur were paid therefor by the defendant.

It also appeared in evidence, that the plaintiff occupied his said premises before the stone-crusher was placed upon the defendant's land; that the ownership, use, and operation of the stone-crusher, engine, and boiler, and the ownership and occupation of said land of the defendant, were reasonably necessary for the keeping of said highways in reasonable order and repair for travel; but that it would have been practicable, by the erection of a board fence, to have prevented said damage to the plaintiff's premises by said dust. It further appeared that the mayor of the city, who was chairman of the committee on public streets, on two occasions during the time alleged, was on the defendant's land.

The material provisions of the city charter and ordinances, which were introduced in evidence, appear in the opinion.

The judge ruled, as matter of law, that the plaintiff was not entitled to recover; and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

B. B. Jones, for the plaintiff.

J. J. Winn, for the defendant.

C. ALLEN, J. If a city or town, instead of leaving the duty of keeping the highways in repair to be performed by the officers, and in the methods provided by the general laws, assumes to perform it by means of agents whom it may direct and control, it may be held responsible for the acts of those agents. The chief grounds of a town's exemption from responsibility for the acts of surveyors of highways, as stated in *Walcott* v. *Swampscott*, 1 Allen, 101, and in later cases, are, that their powers and duties are prescribed and regulated by statute, and that, in the performance of these duties, they are independent of the town, and cannot be directed, or controlled, or removed from office by the town, and are not amenable to it for the manner in which they discharge the trust reposed in them by law; nor can the town exercise any right of selecting the servants or agents by whom surveyors shall perform their work. These reasons are not applicable to a case where a town performs the work by means of agents of its own. *Hawks* v. *Charlemont*, 107 Mass. 414. *Deane* v. *Randolph*, 132 Mass. 475. *Sullivan* v. *Holyoke*, 135 Mass. 273. *Tindley* v. *Salem*, 137 Mass. 171.

The present case falls within the latter class. By the city charter, the administration of all the fiscal, prudential, and municipal affairs of the city of Haverhill is vested in the city council. By the city ordinances, a superintendent of highways, removable at the pleasure of the city council, is to be chosen. He is to act under the direction of the committee on streets, ways, and sewers, which is a committee of the city council. Special provisions show more in detail his subordination to the city council, and to its committee. The work which caused the injury to the plaintiff's property was done on land of the city, which land for a period of nearly three months was used exclusively for the preparation of materials for repairing the streets

and highways of the city. There is nothing to show that this use of the city's land was unauthorized. The contrary is to be assumed. Upon all the facts stated, the work in question appears to have been done by agents of the city, for whose acts and neglects in the performance thereof the city is responsible.

The case of *Barney* v. *Lowell*, 98 Mass. 570, was distinguished, on grounds equally applicable here, in *Hawks* v. *Charlemont*, *ubi supra*, by Chief Justice Chapman, who took part in the decision of both cases. *Exceptions sustained.*

WHEELER *v.* CITY OF CINCINNATI.

1869. 19 *Ohio State*, 19.[1]

The plaintiff brought his action in the court of common pleas of Hamilton county, seeking to recover from the defendant the damages arising from the casual destruction of his house (situated within the limits of said city) by fire; on the ground that the defendant had failed and neglected to provide the necessary cisterns and suitable engines for extinguishing fires, in that quarter of city in which his said house was situated, and that certain officers and agents of the fire department of said city had neglected and failed to perform their duties in regard to the extinguishing of said fire, by reason whereof said fire was not extinguished, as it otherwise might, and could have been. A demurrer to his petition, alleging these facts, was sustained by the court, and judgment rendered for the defendant, which was subsequently affirmed by the district court, upon proceedings in error.

The plaintiff now seeks a review and reversal of those judgments, on the ground of error in sustaining the demurrer to his petition.

J. T. Crapsey and *Collins & Herron*, for the motion.

J. Bryant Walker (*Walker & Conner*), *contra*.

By the Court. The laws of this State have conferred upon its municipal corporations power to establish and organize fire companies, procure engines and other instruments necessary to extinguish fire, and preserve the buildings and property within their limits from conflagration; and to prescribe such by-laws and regulations for the government of said companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental; the extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers, the corporation cannot be held liable to individuals. Nor is it liable for a neglect of duty on the part of fire companies, or

[1] Arguments omitted. — Ed.

their officers, charged with the duty of extinguishing fires. The power of the city over the subject is that of a delegated quasi sovereignty, which excludes responsibility to individuals for the neglect or nonfeasance of an officer or agent charged with the performance of duties. The case differs from that where the corporation is charged by law with the performance of a duty purely ministerial in its character. We know of no case in which an action like the present has been held to be maintainable. *Brinkmeyer* v. *Evansville*, 29 Ind. R. 187; *Western College of Medicine* v. *City of Cleveland*, 12 Ohio St. R. 375.

Leave to file petition in error refused.

HAYES *v.* CITY OF OSHKOSH.

1873. 33 *Wisconsin*, 314.[1]

Action against the city to recover the value of property destroyed by a fire which was caused by negligence in working a steam fire engine belonging to the city. Said engine was being operated at the time to extinguish a fire in the barn of one of plaintiff's neighbors; and was under the control of engineers employed and paid by the city. The city charter provided, in substance, that the common council should procure fire engines, and have charge and control of the same; also that the council should appoint competent officers and firemen, define their duties, fix their salaries, and remove them at pleasure.

Verdict directed for defendant. Plaintiff appealed.

C. Coolbaugh & Son, for appellant.

W. R. Kennedy, (*Gabe Bouck* with him,) for the city.

Dixon, C. J. The question presented in this case is settled by authority as fully and conclusively as any of a judicial nature can ever be said to have been. The precise question may not have been heretofore decided by this court, but a very similar one has, and the governing principle recognized and affirmed. *Kelley v. Milwaukee*, 18 Wis. 83. Neither the charter of the city of Oshkosh, nor the general statutes of this state, contain any peculiar provision imposing liability in cases of this kind; and the decisions elsewhere are numerous and uniform, that no such liability exists on the part of the city. The case made by the plaintiff is in no material respect distinguishable from those adjudicated in *Hafford v. New Bedford*, 16 Gray, 297, and *Fisher v. Boston*, 104 Mass. 87, as well as in several other reported decisions cited in the briefs of counsel, and in all of which it was held that the actions could not be maintained.

The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which

[1] Statement abridged. Arguments omitted. — Ed.

it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given; and hence the maxim *respondeat superior* has no application.

The reasons thus given are satisfactory to our minds, and lead to a conclusion which on the whole seems to us to be just and proper. Individual hardship or loss must sometimes be endured in order that still greater hardship or loss to the public at large or the community may be averted. It would seem to be a hard rule which would hold the city responsible in damages in such cases, when the work in which it, or rather its public officers are engaged, is one of mere good will, a charity, so to speak, designed for the relief of suffering members of the community, or it may be of the entire people of the district. If the legislature sees fit to enact such liability, so let it be; but, in the absence of such enactment, we must hold the liability does not exist.

By the Court. — Judgment affirmed.

WILD *v.* PATERSON.

'1885. 47 *New Jersey Law*, 406.[1]

On demurrer to declaration.

The action is in case. The declaration avers that the city of Paterson, under the authority and direction of its charter, maintained a fire department, of which plaintiff was a member, attached to a certain company, which used a steam fire engine; that it was the duty of the city to provide for that engine a brake and to keep it in good order and repair; that by reason of failure on the part of the city to perform this duty, plaintiff, while assisting to haul the engine to a fire was run over and seriously injured. For the injury thus received plaintiff seeks to recover damages.

A demurrer to this declaration was interposed.

Henry & Dickinson, and *Herbert Stout*, for plaintiff.

F. Scott, and *John W. Griggs*, for defendants.

Magie, J. It has been settled beyond the possibility of further contention in this state, that municipal corporations are not liable to action

[1] Arguments omitted. — Ed.

for neglect to perform or negligence in performing duties imposed on them by law and due to the public, in behalf of any individual suffering damage by reason of such negligence, unless an action is given by statute. Where the employees or officers of a municipal corporation are negligent in the performance of such duties, the doctrine of *respondeat superior* will not apply. *Livermore* v. *Board, &c.*, 2 *Vroom* 508; *Pray* v. *Jersey City*, 3 *Vroom* 394; *Cooley* v. *Freeholders, &c.*, 3 *Dutcher* 415; *Freeholders, &c.*, v. *Strader*, 3 *Harr.* 108; *Condict* v. *Jersey City*, 17 *Vroom* 157.

The duty of the city of Paterson to maintain a fire department is manifestly a duty owed to the public and imposed by law. Any one injured by negligence in the performance of that duty, will be debarred from action for such injury by the well-settled rule above stated.

Plaintiff's contention is that his case is exceptional, and not within the rule, upon the ground that the duty of keeping the machinery used for extinguishing fires in good order, is, as respects those who are employed in its use, a private duty, owed, not to the public, but to the employee.

But the distinction thus sought to be made is, in my judgment, merely specious.

It does not appear what was the precise relation between plaintiff, as a member of the fire department, and the city. Whether his services were voluntarily rendered or were paid for, is not disclosed. But in either case the relation is not the ordinary relation of master and servant. Employees of such corporations in the execution of its public duties have been held to be mere instruments in the performance of such duties, and to act as public officers charged with a public service. *Condict* v. *Jersey City*, *supra*.

The duty to provide and maintain apparatus for extinguishing fires is plainly included within the public duty of establishing a fire department for that purpose. The city, as a corporation, derives from it no special benefit or advantage. The duty is single and undivided, and although the city must perform this duty by means of agents or officers, it owes to them no special duty, differing either in kind or degree from the duty which it owes to others in this respect. The duty is of a public character, and on grounds of public policy its neglect will not give a right of action to any individual in the absence of a statute. If there are any reasons for a modification of this rule with respect to employees of such corporations engaged in hazardous service, they cannot be considered by the courts. The rule can only be modified by the legislature. In the absence of legislation the plaintiff is within the rule and plainly without a right of action.

For this reason the city is entitled to judgment on the demurrer.

MULCAIRNS *v.* CITY OF JANESVILLE.

1886. 67 *Wisconsin*, 24.[1]

Orton, J. The complaint substantially charges that the city, being authorized so to do, about the 9th day of August, 1884, entered upon the construction of a cistern, for the use of the fire department of said city, for protection against fire; that the city was authorized to and did employ men in the construction of the same, and that about the 16th day of said month said city had made an excavation for said cistern and erected within the same a wall of stone masonry, along the sides of the same, resting upon the bottom of said excavation, about 40 feet long, 10 feet high, 20 inches in thickness, and about 12 feet wide; that it was so constructed by the city, in such a careless and negligent manner, and negligently allowed to so remain, to the knowledge of the city, that on the day last aforesaid a portion of it fell upon Thomas Mulcairns, the husband of said plaintiff, who was employed by said city at that time in shovelling earth in the bottom of said cistern, in accordance with such employment, near said portion of the wall, having no knowledge of its unsafe condition and using due care and caution, and caused his death. He left the plaintiff as his widow, and seven minor children dependent upon her for support.

The answer admits the appointment of the plaintiff as administratrix, the incorporation of the city, that it was so engaged in the construction of a cistern, and that part of the wall thereof fell inward, and that Thomas Mulcairns was injured thereby, and died in consequence thereof; but denies all other allegations, and alleges that the cistern was being built by the city with all the care and caution possible to be used; and that the city employed workmen known to be skilful and careful, and used good material; *and employed one James Shearer to superintend and manage the construction of the cistern*, and that he was suitable to do so; and that said cistern was constructed in a skilful manner, without any negligence on the part of the city; and that the falling of said wall was caused or contributed to by the want of ordinary care of the deceased; and that the deceased entered upon his work with full knowledge of the dangerous condition of said wall.

The complaint most clearly states a cause of action against the city, and the first exception, which was to overruling a demurrer *ore tenus* to the complaint, was not error. The answer admits that the wall was built *by the city*, through the agency and under the superintendence of James Shearer, employed for that purpose by the city, and that when it was built it fell upon and killed the deceased.

1. The point made by the learned counsel of the appellant, that the city is not liable because it was in the performance of a public duty in which the city, as a municipal corporation, had no pecuniary interest,

[1] Statement and arguments omitted. — Ed.

and the injury was occasioned by the act or omission of its officers or agents, may as well be disposed of here, because it arises as well upon the pleadings. James Shearer was not one of the public agents or officers of the city, but specially employed to superintend this particular work for the city. Such is the effect of the answer.

The case cited, and the first one on the question in this state, of *Hayes v. Oshkosh*, 33 Wis. 314, goes upon the doctrine generally recognized that when the agents acting for the city are not in the employment of the city, but act rather as public officers, such as the fire department provided for by law, and the city does nothing more than appoint its officers, such persons perform duties fixed by law and not special services contracted to be performed under employment of the city. The distinction between the two cases is very wide and quite apparent. If the city could not be held liable in such a case, it never could in any; for it is a common case of special employment for the performance of special services for and on behalf of the city. It was the legal duty of the city to construct cisterns for fire purposes, and it was engaged in the attempted performance of this duty through its own private agencies, and not through the fire department or its officers, or other officers of the city whose duty it was to perform such work.

The case of *Spelman v. Portage*, 41 Wis. 144, which is clearly in point, most clearly points out these distinctions. The distinction is made perhaps more clearly in the cases of *Harper v. Milwaukee*, 30 Wis. 365, and *Little v. Madison*, 49 Wis. 605. Both the principle and the distinction of cases are fully considered and clearly established in our own cases, so that we need not concern ourselves very much about cases in other states, for the above cases were decided upon a full examination of authorities elsewhere.

[Remainder of opinion omitted.]

Judgment for plaintiff affirmed.

THOMPSON NAVIGATION CO. *v.* CITY OF CHICAGO.

U. S. District Court, N. D. Illinois. 1897.

GROSSCUP, J. This is a libel *in personam* against the city of Chicago, growing out of a collision between the fire tug Yo Semite, owned by that city, and the propeller City of Berlin, owned by the libellant. The collision occurred in the Chicago river, near the point where it branches into its south and north forks. At the time of the collision, the City of Berlin was lying in winter quarters. The circumstances of the collision were such that had the tug been owned by private owners, and engaged in a private enterprise, there could be no doubt of her liability for the injury done. In saying this, I keep fully in view

the fact that fire tugs are expected by the nature of their duties to make haste. The haste in this case was blind and thoughtless, resulting in a delay to the tug, as well as injury to the City of Berlin. Indeed, counsel for the city do not seriously contest the fact of negligence. But the fire tug was at the time of the collision owned by the city of Chicago, and actually engaged in one of the public duties that Chicago, as a part of the government, undertakes. Do these facts, or either of them, exempt her, or the city, responding in her behalf, from what would otherwise be her clear liability?

At common law, one injured either in his property or person looks for compensation to the person or persons causing the injury, or to the master or principals of such persons, where the injury was done within the scope of their agency or service. In admiralty the rule is this: The vessel committing the unlawful injury is considered the offender, and the owner is mulcted to the extent of his interest in the vessel; not because he stands in the relation of principal or master to the crew, but alone because of the fact of ownership. Thus, under laws preventive of piracy or smuggling, the vessel may be seized, condemned, and sold, notwithstanding the crew committing the unlawful acts were engaged by the owner for a lawful enterprise only, and were, in the commission of the unlawful acts, wholly outside the scope of their engagement. *U. S.* v. *The Malek Adhel*, 2 How. 210. Commenting upon this apparent anomaly of maritime jurisprudence, and showing that the doctrines advanced in the case then under consideration were not different from those prevailing generally in maritime law, Mr. Justice Story, at page 234, speaks as follows: "The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

It is thus apparent that the liability of the owner, to the extent of his vessel, for injuries caused in a collision by negligence or misconduct, is not dependent upon the relation of master and servant, or principal and agent, existing between him and the crew manning the vessel, but rests solely upon the fact of ownership. The ship, which, in contemplation of maritime law, is not the hulk and machinery only, but includes the crew as well, is, as such, the offender, and the ensuing losses reach the owner simply because of his relationship to the offender. In Rome, it is said that, when the owner of slaves was assassinated, every slave belonging to him, however otherwise innocent, was put to death. The penalty came not as the result of participation, but as the result of relationship. The maritime law, for justifiable public purposes, inverts this mandate, putting every owner, by virtue

of such relation, to the duty of compensation for losses inflicted by his ship property, to the extent, at least, of the value of such property. Nor is this liability of the owner indirect alone, for the admiralty rules of the supreme court provide (Rule 15) "that, in all suits for damage by collision, the libellant may proceed against either the ship and master, or against the owner alone *in personam*." The method of procedure chosen does not change the substantive right or liability. In either case the ship is the offender. If the procedure be against the ship alone, resulting in seizure and sale, the owner is only indirectly reached; but, if it be against the owner *in personam*, the remedy against him is direct. The substantive right is compensation for the injury, and can be either by way of the ship or from the owner directly.

A firm grasp of this principle of maritime law clears this case of its difficulties. At common law the city is not liable for the negligent acts of its fire department, for the reason that the members of the fire department are not the servants of the city in its corporate capacity. The negligence of the firemen, therefore, is not attributable to the city. But in the case under consideration the injury done by the vessel, including its crew, to the libellant, is chargeable to the owner, by virtue of the mere fact of ownership, and can be collected, directly, by seizure of the vessel, or, indirectly, by a suit *in personam*. In either case the liability rests, not in the relation of principal and agent, or master and servant, but in the bare fact of ownership.

But, though such liability exists, reasons of public policy may, in some cases, exempt the owner from suit. The government, as sovereign, for instance, declines to be made compulsorily amenable to the courts upon even its just obligations. This exemption, however, is founded entirely in public policy (*The Siren*, 7 Wall. 152), and ought not to be extended to cases where such considerations do not intervene. In England, I think, they do better. In claims arising against public vessels, the apparently conflicting right of the sovereign to exemption from suit, and her duty to respond to just claims, are both maintained by a procedure, effective, though somewhat fictitious. A petition of right is addressed by the aggrieved person to the lords in admiralty, representing the crown, who, in turn, direct their proctor to appear and answer a suit to be commenced in the admiralty court. This is equivalent to a waiver by the crown of its privilege as a sovereign, and to a consent that the rights of the parties be tried and determined in the suit as between subject and subject. There appears, however, to be no way of making the government of the United States, or of a state, parties to such a proceeding, because no procedure has been invented here whereby the right of immunity from suit is waived. But the city of Chicago is, by law, amenable to suit and judgment upon all just claims that may be brought against it. The doctrine of public policy, therefore, under which this exemption is accorded to sovereigns, stops short of city government. The law by making such cities suable

abolishes the doctrine in what might otherwise be its application to city governments. The legislative will has, in effect, decreed that there is no public policy excepting cities from suit. The city is suable, and may be decreed to pay as a private owner where a case is proved. This clearly differentiates this case from *The Siren*, *supra*.

One other consideration alone remains: I have held, on the strength of *The Fidelity*, 16 Blatchf. 569, decided by Chief Justice Waite on the circuit, that an action *in rem* cannot lie against this fire boat. Will that prevent a decree *in personam* against its owner? The difference between mere procedure and substantive right must be steadily borne in mind. The latter alone determines the right of some judgment or redress. The former only fixes the method of reaching it. A seizure of the vessel is only a species of execution in advance of judgment. It is usually permissible in admiralty, because, under ordinary circumstances, most effective and equitable. But public policy prevents its application to such instrumentalities of emergency as a fire tug. A city cannot be left to burn while a contest over a few dollars of damage is going on. The law, therefore, out of considerations of public policy, forbids such seizure, or any process that would disarm the city, even temporarily, of its equipment to put down fires or like dangers. But exemption of the owner of the boat from one of the ordinary processes of the court is not, either in logic or law, a grant of immunity against liability, through some other procedure, not subject to such objections. The consideration of public policy extends only to the mischief to be averted. To give it a wider application would make it an instrument of injustice. An apt illustration of this limitation on procedure only is seen in the law which exempts cities, in the common-law court, from seizure of their property upon execution. But it has never been urged that, because of that, they were not suable at all, or that judgments entered against them were in no way enforceable.

My conclusion is that the city of Chicago, as owner, at the time of the collision, of the fire boat, is responsible to the libellant in an action *in personam* to the extent of the value of such fire boat for the injuries caused. I recognize that in this conclusion I depart from the case of *The Fidelity*, *supra*, but believe myself to be in consonance with the doctrine laid down in *The Siren*, *supra*, and *The Malek Adhel*, *supra*.

Decree accordingly.

SPRINGFIELD FIRE &c. INSURANCE CO. *v.* VILLAGE OF KEESEVILLE.

1895. 148 *New York*, 46.[1]

Appeal from judgment of the General Term of the Supreme Court in the Third Judicial Department [reported in 80 Hun, 162].

The complaint sets forth that the plaintiff is a Massachusetts corporation and that the defendant is a village organized under the provisions of chapter 291 of the Laws of the state of New York, passed in 1870, and the amendments thereto; that the plaintiff carried on the business of fire insurance within the limits of the defendant, and for the privilege of so doing, and of having the protection of the water works and fire department and appliances of defendant, had paid an annual tax to the defendant; that the defendant had a system of water works and fire appliances, which were maintained by taxes levied upon all its taxable inhabitants, including plaintiff and other insurance companies, and by water rents paid by such inhabitants. The complaint then proceeds to set forth the insurance by the plaintiff of property of one Emily E. Brewer, for a percentage less than for like property outside the limits of the water and fire protection, and the destruction by fire thereof; in consequence whereof the plaintiff had paid to her, under its contract of insurance, $4,450. The complaint then sets forth the assignment to plaintiff by Emily E. Brewer of all claims and damages against the defendant, by reason of said fire and damages, and alleges that "at the time of the aforesaid fire, the defendant had wrongfully and negligently allowed and caused its said water works, pumps, pipes and fire appliances to become and be out of repair, broken and weakened, stopped with mud and other foreign objects, and unfit for use, to such extent that water could not be thrown or put upon said dwelling house to extinguish the fire therein; that when the hose was laid and opened, and ready to throw water upon the fire in said house, said fire was very slight and had done very little damage; that if said fire appliances and water works had been in proper working order said fire would and could have been extinguished without damaging said house to exceed three hundred dollars; that at the time of said fire, and for several years previous thereto, the defendant, under and in pursuance of the powers granted it by the laws of the state of New York[2] had assumed to maintain water works and

[1] Statement abridged. Arguments omitted. — Ed.

[2] "The complaint must be read in connection with the statutes governing the defendant; they are as much a part of the complaint as if written in it.

"The defendant was authorized by Chapter 181 of the Laws of 1875, and various acts amendatory thereof, to construct and maintain water works to supply its inhabitants with water.

fire appliances and a fire department for the purpose, among other things, of protecting the property of the inhabitants of defendant against loss by fire, of all which plaintiff and its assignor had notice, and in reliance thereon said assignor paid taxes to defendant to maintain the same, and plaintiff paid taxes to defendant for said purpose, and insured property at reduced rates as aforesaid; . . . that plaintiff's aforesaid loss of $4,450, to the extent of at least $4,150, was caused solely by the negligence and wrongful and unlawful acts of defendant, in failing to keep its water works and fire appliances in proper working order, and in failing to employ competent men to manage and care for the same." The complaint then demanded judgment for the said sum of $4,150.

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

At the General Term the demurrer was overruled.

Chester B. McLaughlin, for defendant.

A. W. Boynton, for plaintiff.

GRAY, J. The learned justice who spoke for the General Term, in a very elaborate and interesting opinion, proceeded, very correctly, as I think, upon the assumption that the negligence charged against the defendant in the complaint related entirely to its water works system. In the view which we take of the matter, it is of comparatively little consequence whether the plaintiff bases its right of action upon negligence with respect to the fire department as such, or to the water department as such. But the fair reading of the complaint undoubtedly warrants the assumption of the learned justice at General Term.

If I correctly apprehend the reasoning, which led the General Term to the conclusion that there was a municipal liability upon an admission of the facts set forth in the complaint, it rests, in the main, upon two theories. In the first place it is held that by the voluntary assumption on the part of the defendant of the power conferred by statute to construct and maintain water works, it became responsible for the proper exercise of such power and that such responsibility is necessarily demanded in the interest of an efficient public service, and the inhabitants, who have contributed to the maintenance of such a public work, have a right to hold the defendant to the exercise of reasonable care and diligence and to a liability for a failure to do so. In the next place, it is held, while not deeming that the defendant had engaged in a private corporate business,

"The president and trustees constitute the board of water commissioners. (Chap. 74, Laws of 1891.)

"The defendant receives rents for supplying water; it has control over all the employees connected with the water works; it can employ and discharge them at pleasure; they are its servants. The construction and maintenance of the water works is something that was not forced upon it by the power of the state; it could act under the law authorizing it to construct and maintain water works, or refuse to act, at its pleasure. . . ." HERRICK, J., in 80 Hun, pp. 167, 168. — ED.

conducted for its own benefit and not for the general public, nevertheless, that the defendant having agreed to erect and take charge of the public work and enterprise for the public within its boundaries, if there is a failure to exercise reasonable care and diligence in maintaining it, there has been a breach of an implied contract, for which, if injury results, an action will lie. Holding these views, the learned General Term felt compelled, because of the admission by the defendant, through its demurrer, of the allegations of wrongful and neglectful conduct in relation to the maintenance of its water works, to hold that the plaintiff made out a good cause of action.

The proposition that such a liability rests upon a municipal corporation, as is asserted here, is somewhat startling and I think the learned General Term justices have misapprehended the nature of the responsibility, which devolved upon the defendant in connection with its maintenance of a water works system, as well as the character of the power which it was authorized to exercise in relation thereto. I might remark, in the same spirit of criticism which was assumed by the learned justice at General Term, that while the efficiency of the public service would be promoted by holding municipal corporations to the exercise of reasonable care and diligence in the performance of municipal duties and to a liability for injury resulting from a failure in such exercise, the application of that doctrine to such a case as this might, and probably would, be highly disastrous to municipal governments. A little reflection will show that a multitude of actions would be encouraged, by fire insurance companies, as by individuals, and that cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained.

The distinction between the public and private powers conferred upon municipal corporations, although the line of demarcation at times may be difficult to ascertain, is generally clear enough. It has been frequently the subject of judicial discussion and, among the numerous cases, it is sufficient to refer to *Bailey* v. *The Mayor* (3 Hill, 531); *Lloyd* v. *The Mayor* (5 N. Y. 369) and *Maxmilian* v. *The Mayor* (62 id. 160). The opinion in *Darlington* v. *The Mayor* (31 N. Y. 164) is also instructive upon the subject. When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for non-user or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation. Then, the investiture of municipal corporations by the legislature with admin-

istrative powers may be of two kinds. It may confer powers and enjoin their performance upon the corporation as a duty; or it may create new powers to be exercised as governmental adjuncts and make their assumption optional with the corporation. Where a duty specifically enjoined upon the corporation as such has been wholly neglected by its agents and an injury to an individual arises in consequence of the neglect, the corporation will be held responsible. (*Mayor* v. *Furze*, 3 Hill, 612, 619.) So, in *McCarthy* v. *Syracuse* (46 N. Y. 194), it was held that where a duty of a ministerial character is imposed by law upon the corporation, a negligent omission to perform that duty creates a liability for damages sustained. Such responsibility, however, would not attach to the corporation where it has voluntarily assumed powers, authorized by the legislature under some general provision respecting municipalities throughout the state and permissive in their nature; and at this point I touch one of the theories upon which the General Term decision seems to rest. In such a case — and I speak, of course, of legislative acts which are general in their nature and scope — the assumption by the municipal corporation is of a further function of self, or local, government and such a power is discretionary in its exercise, and carries with it no consequent liability for non-user or misuser. In the legislature reside the power and force of government, confided to it by the People under constitutional restrictions. In the creation of municipal corporations subordinate commonwealths are made, upon which certain limited and prescribed political powers are conferred and which enjoy the benefits of local self government. (*People ex rel., etc.*, v. *Detroit*, 28 Mich. 228.) When, in addition to those general powers which are prescribed upon the creation of a municipal corporation, general statutes permit the assumption of further powers as a means of benefiting the portion of the public in the particular locality, they invest the corporation availing itself of the permission with just so much more governmental power. Just as the general powers deposited with the various municipalities are exercised by them in a *quasi* sovereign capacity, so would any added powers designed for the general public good, though optional with the corporation as to their assumption, and in their exercise and performance local, be exercised. They are not special, as being designed for and granted to a particular municipality; for they are applicable to every part of the body politic where municipal government exists. Such powers, in legal contemplation, appertain to the municipal corporation as such, and may be adopted as a part of the governmental system.

The acts, under which the defendant was authorized to construct and maintain a system of water works, constitute a general law, applicable to all incorporated villages in the state. They impose no duty and, when availed of, the task undertaken is discretionary in its character. The grant of power must be regarded as exclusively for public purposes and as belonging to the municipal corporation,

when assumed, in its public, political or municipal character. In *Bailey* v. *The Mayor* (3 Hill, 531), to which reference is made in the opinion below, the city of New York, at a very early day, was authorized by special legislation to engage in the work of supplying its citizens with water and to acquire lands and water rights for the purpose and, as it is clear from the reading of the opinion of Chief Justice NELSON, the city was regarded in the light of any other private company, because of the special franchises conferred. Assuming that we could regard the doctrine of that case as authoritative at the present day, as to which there has been, and might be, some question, (see *Darlington* v. *The Mayor, etc., of New York, supra*), the decision is inapplicable to the present case. In *Hunt* v. *The Mayor* (109 N. Y. 134) the case turned upon the performance by the city of the duty cast upon it to keep its streets in a safe condition for travel. In *Cain* v. *Syracuse* (95 N. Y. 83), the discussion was as to the nature of the duty imposed upon the defendant by the power in its charter to pass ordinances, among other things, for the razing of buildings which had become dangerous by reason of fire. The failure of the common council to pass a resolution in respect to the building in question was not deemed to be a neglect of a duty. It was a discretionary matter. Nothing was decided in that case, which controls the decision of the present case, or which affects the discussion materially.

Nor can we assent to the view that the defendant sustains such an implied contractual relation to the public within its boundaries, with respect to the construction of this public work, as to be responsible for a failure to exercise reasonable care and diligence in respect to its maintenance. If the views which I have, somewhat briefly, expressed are correct, the defendant exercised a function which, like all governmental functions, was purely discretionary. What it undertook to do, when availing itself of the privilege of the general act, was to provide for the local convenience of its inhabitants.

The industry of the defendant's counsel has collated a great number of decisions by the courts of other states, which indicate a very general view that the powers conferred by the law of the state upon its municipal corporations to establish water works and fire departments, are, in their nature, legislative and governmental. From them I may select one or two. In *Edgerly* v. *Concord* (62 N. H. 8), it was said by the court: "As a part of the governmental machinery of the state, municipal corporations legislate and provide for the customary local convenience of the people and in exercising these discretionary functions the corporations are not called upon to respond in damages to individuals, either for omissions to act or in the mode of exercising the powers conferred on them for public purposes and to be exercised at discretion for the public good. For injuries arising from the corporation's failure to exercise its public, legislative and police powers, and for the manner of executing those

powers there is no remedy against the municipality, nor can an action be maintained for damages resulting from the failure of its officers to discharge properly and efficiently their official duties."

In *Tainter* v. *Worcester* (123 Mass. 311), it was said by the court: "The protection of all buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are, therefore, authorized by general laws to provide and maintain fire engines, etc., to supply water for the extinguishment of fires. The city did not by accepting the statute and building its water works under it enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained."

In *Maxmilian* v. *The Mayor* (62 N. Y. 160), the reasoning of the opinion permits a clear inference that this defendant did not, by accepting the provisions of the statutes, assume a duty of the kind which arises from the grant of a special power. Judge FOLGER uses this language, in his discussion of the two kinds of duties which are imposed upon a municipal corporation: "The former" (referring to the case of a grant of a special power), "is not held by the municipality as one of the political divisions of the state." Again he says: "Where the power is intrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user, nor for misuser by the public agents;" citing *Eastman* v. *Meredith*, (36 N. H. 284).

This defendant, precisely, is entrusted with the power to maintain its water works, because it is one of the political subdivisions of the state to which the general act has reference in its general grant of power or privilege.

Nor does the fact that water rents are paid by the inhabitants of the defendant affect the question. This fact is made use of to show the private corporate character of the water works system; and the suggestion is that profit or benefits accrue to the defendant whereby the corporate undertaking is affected with a private interest. But that is an incorrect notion. The imposition of water rents is but a mode of taxation and a part of the general scheme for the purpose of raising revenue with which to carry on the work of government. If profits accrue over the expense of the maintenance of the system, they go to benefit the public by lessening the general burden of taxation.

The fallacy, as it seems to me, which affects the argument that the municipal corporation can be made liable for the non-user or misuser of its power, consists in that it fails to appreciate the true nature of the function which the corporation performs. It adds to its political machinery for the purpose of benefiting and of protecting its inhabi-

tants. There is nothing connected with the work, which is not of a governmental and public nature. It is in no sense a private business, and the authority to construct the works was given to it by the legislature, not at its own particular instance or application, but because it was one of the political subdivisions of the state and, as such, was entitled to exercise it. How could it justly be said that the maintenance of the water works system, any more than of a fire department, was a matter of private corporate interest? Is it not for all the inhabitants and for their good and protection? No interest was designed to be subserved, other than that of adding to the powers of a community carrying on a local government. If that is true, the alternative is that being for public purposes and for the general welfare and protection, the defendant assumed a governmental function and comes under the sanction of the rule which exempts government from suits by citizens.

Further elaboration of the subject is quite possible; but the views expressed seem sufficient to justify the conclusion that the determination reached by the General Term was erroneous.

The order and judgment appealed from should be reversed and the judgment entered at the Special Term should be affirmed, with costs.

All concur (BARTLETT, J., upon grounds stated in the opinion, and also upon the further ground that this court decided the principle here involved in *Hughes* v. *The County of Monroe*, 147 N. Y. 49).

Ordered accordingly.

SALT LAKE CITY *v.* HOLLISTER.

1886. 118 *U. S.* 256.[1]

APPEAL from the Supreme Court of the Territory of Utah.

Suit by the city, against the U. S. collector of internal revenue, to recover the sum of $12,057.75 illegally exacted by him for a special tax upon spirits alleged to have been distilled by the city.

The answer of the defendant alleges that the tax was legally assessed, and avers that the plaintiff, during all the time for which said assessment was made, was actually engaged in distilling, producing, and dealing in, as distiller, said spirits so assessed, and said assessment of said gallon tax was made upon distilled spirits actually produced by the plaintiff, and upon which plaintiff had not paid the gallon tax required by law, said spirits not having been deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but taken from said distillery by the plaintiff, after having been produced and distilled as aforesaid, and sold by said plaintiff, and the proceeds of said sale turned into the treasury of the plaintiff.

[1] Statement abridged. — ED.

The answer also alleges that the plaintiff, from March 2, 1867, to Aug. 26, 1868, was distilling and producing spirits, and receiving and appropriating the benefit arising therefrom.

The answer further alleges that the plaintiff regularly reported and paid to the collector the gallon tax due upon a part of the spirits distilled by the plaintiff, but that the plaintiff neglected to report all of the spirits it actually distilled, and that the tax now in question was assessed upon the spirits distilled in excess of the amount reported by the plaintiff.

A demurrer to the answer was overruled, and, the plaintiff refusing to plead further, judgment was rendered for the defendant.

Franklin S. Richards, (*Benjamin Sheeks*, and *J. L. Rawlins*, with him), for plaintiff.

Solicitor General, for defendants.

MILLER, J. [After stating the case.] It will be perceived that this demurrer admitted that the plaintiff, The City of Salt Lake, had been for a period of about eighteen months engaged in the business of distilling and producing spirits and selling the same, and placing the proceeds of the sale in its treasury. That during this time the plaintiff made regular reports as to the quantity produced and paid the tax on the amounts so reported. But that while it thus operated said distillery, it failed and neglected to report all the spirits which it produced, and the tax assessed and collected, and which the present suit is brought to recover back, was for the spirits of which no report was made.

The Commissioner of Internal Revenue having assessed plaintiff for these distilled spirits and placed the assessment in the hands of defendant, he, as a means of collecting the tax, did threaten to seize and sell property of plaintiff, whereupon plaintiff paid the sum mentioned.

It would seem that this unqualified admission that the city was actually engaged in the business of distilling spirits liable to taxation, and replenishing her treasury with the profits arising from the operation, ought to be a justification of the officer who collected the tax due for the spirits so distilled. And this argument is all the stronger, since the city acknowledged its liability as a distiller by paying voluntarily the tax due on the larger part of the spirits produced.

But while the city does not deny the *actual* fact of distillation, and of fraudulent returns by it, it denies the whole affair by argument. It says, that, though it is very true the city did distil spirits, did sell them, and did receive the money into its treasury, it cannot be held liable for this because it had no legal power to do so. Its want of corporate authority to engage in distilling is to be received as conclusive evidence that it did not do so, while by the pleading it is admitted that it did. Because there was no statute which authorized it as a city of Utah to distil spirits, it could engage in this profitable business to any extent, without paying the taxes which the laws of the United States require of every one else who did the same thing.

St. carries ultra vires doctrine too far here, says 9. C. 19.

If the Territory of Utah had added to its other corporate powers that of making and selling distilled spirits, then the city would be liable to the tax, but, because it had no such power by law, it could do it without any liability for the tax to the United States or to any one else.

It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour, and proceed to the more profitable business of distilling spirits, which would be unauthorized by their charters or articles of incorporation; for they would thus escape taxation and ruin all competitors.

It is said that the acts done are not the acts of the city, but of its officers or agents who undertook to do them in its name. This would be a pleasant farce to be enacted by irresponsible parties, who give no bond, who have no property to respond to civil or criminal suits, who make no profit out of it, while the city grows rich in the performance. It is to be taken as a fair inference on this demurrer that all that the city might have done was done in establishing this business. The officers who, it is said, did this thing, must be supposed to have been properly appointed or elected. Resolutions or ordinances of the governing body of the city directing the establishment of the distillery and furnishing money to buy the plant, must be supposed to have been passed in the usual mode. Everything must have been done under the same rules and by the same men as if it were a hospital or a town hall. If the demurrer had not admitted this, it could no doubt have been proved on an issue denying it.

But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation, and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. It had no authority to take the man's land or to invade his premises. But if the governing board had directed the act, the corporation could be sued for the tort, in an action of ejectment, or in trespass, or on an implied assumpsit for the value of the land. A plea of *ultra vires*, in this case, would be no defence.

The truth is, that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi-criminal, the corporation may be held to a pecuniary responsibility for them to the party injured.

This doctrine was announced by this court nearly thirty years ago in a carefully prepared opinion by Mr. Justice Campbell in the case of *Philadelphia, Wilmington and Baltimore Railroad Co.* v. *Quigley*, 21 How. 202.

[The learned Judge then stated the last mentioned case; and also referred to *Reed* v. *Home Savings Bank*, 130 Mass. 443, 445, and *Copley* v. *Grover and Baker Sewing Machine Co.*, 2 Woods, 494, in which the defendant corporations were held liable to actions for malicious prosecution.]

It is said that Salt Lake City, being a municipal corporation, is not liable for tortious actions of its officers.

While it may be true that the rule we have been discussing may require a more careful scrutiny in its application to this class of corporations than to corporations for pecuniary profit, we do not agree that they are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in evasion of legal obligations to the State or the public. A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the Government on such business or transaction by whomsoever conducted. See *McCready* v. *Guardians of the Poor of Philadephia*, 9 S. & R. 94.

It remains to be observed, that the question of the liability of corporations on *contracts* which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practised on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong — cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*.

But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Louisiana* v. *Wood*, 102 U. S. 294; *Chapman* v. *Douglass County*, 107 U. S. 348, 355.

The judgment of the Supreme Court of Utah Territory is

Affirmed

CHAPTER IV.

IMPLIED POWER — TO CONTRACT ON CREDIT — TO BORROW MONEY — TO ISSUE NEGOTIABLE INSTRUMENTS.

KETCHUM *v.* CITY OF BUFFALO.

1856. 14 *New York* (4 *Kernan*), 356.[1]

Suit by tax-payers of the city of Buffalo, against the city and one Austin. The city purchased land of Austin for market grounds at the price of $35,000, and gave Austin its bond for that amount, payable in twenty-five years with semi-annual interest. The comptroller of the city presented to the common council his estimate of expenses to be levied by tax in which was an item of $3,675, interest on said bond to Austin. Plaintiffs seek to have the transaction between Austin and the city declared void, and ask that the city be perpetually enjoined from levying any tax for payment of said bond or the interest thereon.

In the Supreme Court judgment was rendered dismissing the complaint. Plaintiffs appealed.

H. W. Rogers, for appellants.

John L. Talcott, for respondents.

Selden, J. [After deciding that the city had power, under its charter, to purchase land for the purpose of a market.]

But admitting that the city had a right to make the purchase, it is denied that it could purchase upon credit, and execute the bond given for the purchase money. The power of corporations in general to make contracts and incur debts in the prosecution of their legitimate business, and to give their promissory notes for such indebtedness, would seem to be firmly established, not only by universal practice, but by repeated judicial decision. (*Mott* v. *Hicks*, 1 *Cow.*, 513; *Moss* v. *Oakley*, 2 *Hill*, 265; *Kelly* v. *The Mayor of Brooklyn*, 4 *Hill*, 263; *Moss* v. *McCullough*, 5 *Hill*, 131; *Attorney-General* v. *Life and Fire Insurance Company*, 9 *Paige*, 470; *McCullough* v. *Moss*, 5 *Denio*, 567.)

In the last of these cases the judgment was reversed, not on the ground that the corporation had not the power to contract the debt,

[1] Statement abridged. Only so much of the case is given as relates to a single point. — Ed.

or to give the promissory note, but for the reason that the property purchased was not required for the legitimate purposes of the company. Senator Lott, by whom the leading opinion was given, says: "I am satisfied that the note in question was given for purposes and objects unauthorized by its charter, and, therefore, not obligatory." It is true, the learned senator, in the course of his opinion, seems to intimate a doubt whether a corporation like that of the Rossie Lead Mining Company, instituted for specific business purposes, with a limited capital, can virtually add to that capital by the purchase of a large amount of property upon credit, especially where, as in that case, each stockholder is made individually liable for all the debts of the company.

However this may be, sound reason, no less than the authorities to which I have referred, forbid that it should be held that a corporation may not incur a debt in the exercise of its appropriate powers, or may not purchase, upon a credit, property which is required for purposes authorized by its charter. Municipal corporations, especially, obtain their funds, for the most part, periodically, by means of annual taxation, and it is impossible by any degree of care to adjust their means to their wants so accurately but that exigencies will arise, rendering necessary a resort to the credit of the corporation.

To deny to such corporations the power to use their credit in any case, would scarcely comport with the objects for which they are created. Under such a rule they could not procure materials for the repair of a bridge, unless the money had been raised in advance. The affairs of no municipal corporation were ever conducted, I presume, without incurring obligations, for various purposes, in anticipation of its revenues. It may be said that there is a distinction between incurring debts for the ordinary and current expenses of the corporation, to be defrayed by the expected annual income, and debts upon an extended credit, for objects of a permanent character, as, for instance, that a debt may be created for the repair of a bridge or market, but not for the erection of or procuring a suitable site for such market. I am unable to discover any solid basis for such a distinction, or any definite line by which it could be marked.

It is easy to see that it would be extremely difficult, if not impossible, to manage the affairs of a municipal corporation, without the power to contract upon its credit. Every contract for labor, not paid for in advance, is necessarily a contract upon credit, because the labor, when once performed, cannot be recalled. It is otherwise in case of the purchase of property to be paid for on delivery, because, unless payment is made, it need not be delivered. Still, if it consist of several parcels, as of several loads of lumber or of stone, to be delivered at different times, and paid for when all are delivered; this is a contract upon credit for all except the last load. Were a corporation authorized in general terms to build a bridge, without specification of manner or means, it would scarcely be doubted that it might

contract with some person to furnish the materials and erect the bridge at a specific price, to be paid upon the completion of the job, and yet this would be to build the bridge entirely upon the credit of the corporation.

But it is useless to multiply arguments upon this point. The power of a corporation to contract upon its credit cannot reasonably be denied; and if it may do so at all, there is, I think, no rule of law which limits the length of such credit. If a corporation may make an executory contract for property or services, it must of necessity have power to agree upon the mode and terms of payment; and to say that it cannot also agree as to the time of payment, is to make a distinction which rests upon no sound principle, and is not warranted by any authority.

If, then, the city of Buffalo had power, under its charter, to purchase ground for a market, it had authority, so far as the charter is concerned, to do so upon a credit to which there was no limit but its own discretion, and the right to give the single bill in question would follow as a necessary consequence. Power to contract the debt must carry with it power to give a suitable acknowledgment of the indebtedness, in the form either of a promissory note or a single bill. I can conceive no well grounded rule which would concede one of these powers and deny the other, and no such distinction is warranted by the cases.

It may be objected that the reasoning here adopted tends to establish the right of a corporation to contract a debt for any authorized purpose, by borrowing the money necessary to accomplish it; a right which, from the numerous legislative acts on the subject, it would seem corporations have not generally been supposed to possess. It is true the power to contract to pay A. $10,000 at the end of a year for doing certain work, and the power to borrow $10,000 of B., upon a credit of a year, for the purpose of paying A. for doing the work, might seem, at first view, to be substantially identical. The amount is the same, and the time of payment the same; the creditor only is different.

A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt created cannot be diverted to any illegitimate purpose. The contract not only creates the fund, but secures its just appropriation. On the contrary, if the money may be borrowed, the corporation will be liable to repay it, although not a cent may ever be applied to the object for which it was avowedly obtained. It may be borrowed to build a market and appropriated to build a theatre, and yet the corporation would be responsible for the debt. The lender is in no way accountable for the use made of the money. It is plain, therefore, that if the policy of limiting the powers and

expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. If they may procure the requisite funds by the indirect method of borrowing, they may resort to any other indirect mode of obtaining them, such as establishing some profitable branch of trade, entering into commercial enterprises, &c., the avowed object being to obtain the means necessary to accomplish some authorized purpose. No one can fail to see that to concede to corporations the power to borrow money for any purpose, would be entirely subversive of the principle which would limit their operations to legitimate objects. Hence the distinction between such a power, and that of stipulating for a credit in a contract made for the direct advancement of some authorized corporate object. It is true that the act to restrict and regulate the power of municipal corporations to borrow money, contract debts, and loan their credit, passed in 1853 (*Laws of* 1853, 1135), would seem to proceed upon the assumption that such corporations, independently of legislative restrictions, have the power to borrow money. This important question, however, is yet to be judicially settled, but as it is not involved in this case, I will not dwell longer upon it.

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[The concurring opinion of WRIGHT, J., is omitted.]

Judgment affirmed.

MILLS *v.* GLEASON.

1860. 11 *Wisconsin*, 470.[1]

ACTION to restrain Gleason, treasurer of the county of Dane, from selling the lands of the plaintiff lying in the city of Madison, for the taxes assessed in the year 1857. Said tax was levied, in part, to raise a sum of $8,000.00, to be paid as interest on a loan of $100,000.00 previously obtained by the city, and for which bonds had been issued. These bonds had been negotiated at a discount. The money thus received had been paid into the city treasury, and much of it had been used in the erection of city buildings and for general city purposes. The plaintiff claimed that the city had no power to effect the loan or to levy a tax to pay interest upon it.

The County Court gave judgment for the plaintiff, and the defendant appealed.

S. U. Pinney, for appellant.

Abbott & Clark, for respondent.

PAINE, J. . . . But it is claimed that the city had no power to make

[1] Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

this loan, or issue its bonds therefor. There is no special act and no provision in its charter expressly authorizing it, and it was said that without this, the power to borrow money did not exist, and could not be claimed as incidental to the execution of the general powers granted by the charter. The charter does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which, money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would pass as an incident to the execution of these general powers, according to the well settled rule that corporations may resort to the usual and convenient means of executing the powers granted; for certainly no means is more usual for the execution of such objects, than that of borrowing money. But an argument against the right is derived from the practice which has prevailed to a considerable extent, of obtaining special acts of the legislature, authorizing the procurement of loans by municipal corporations, and the issuing of bonds or other securities in payment.

We are not aware to what extent, if any, this practice has prevailed in this state, as to loans for purposes clearly municipal, and authorized by the charter; but it seems to have been resorted to sometimes, even in such cases, in other states. The argument drawn from the assumption on the part of the legislature of the necessity of such acts, is one always entitled to consideration, and sometimes of much weight, though never conclusive; and we think, owing to the peculiar nature of the subject matter, that in cases involving a loan by corporations, it is of less force than in almost any other, for capital is of a timid jealous disposition. It delights in certainty, and is alarmed by doubts. It has been held with great strictness, that corporations can exercise no powers except those granted by their charter. When, therefore, the charter does not expressly give the power of borrowing money, even though it grants powers to which this might be claimed as incident, yet there is room for doubt, a chance for an argument, and that being so, it might, as a matter of policy, facilitate the loan by removing all uncertainty by an express act of the legislature. And the fact that such acts have been passed, being then clearly necessary, when these corporations have been authorized to issue bonds in aid of purposes outside of their charters, may have had a tendency to induce a resort to the same practice when the bonds were issued for some purpose authorized by the charter, though in that case such legislation may not have been necessary. For these reasons we think there is nothing in this practice sufficient to overthrow the general rule, that in the absence of restrictions, a corporation authorized to contract debts and to execute undertakings requiring money, may borrow money for those purposes, and issue its bonds or other obligations therefor.

This question is alluded to in *Ketchum vs. the city of Buffalo*, 4th Kern., 356, and the court held that the fact that in several other

instances, the legislature had expressly granted power to corporations to "purchase market lots," did not justify the conclusion that the city of Buffalo could not exercise the power as incidental to the general power of establishing a market. The court held that, under that general power, it might purchase the lot on credit, and issue its bonds in payment. And, after carefully considering the suggestions made by the learned judge who delivered the opinion, we fail to perceive any substantial distinction, so far as the question of power is concerned, between the method there adopted and that adopted by the city of Madison in this case. True, it is there suggested that the question whether the city of Buffalo could have borrowed the money and paid for the lot, and issued its bond for the money, was a different question, though at first view "they might seem identical." But on examining the points of distinction stated, we think they do not affect the question of power, but simply go to show that the one method of exercising it may afford less facility for a misapplication of the funds than the other. Thus it was said that if the money was borrowed to build a market, it might be used to build a theatre, whereas if the contract were directly for the market, and the bond given in payment, it would ensure the application of the fund to its legitimate object. This might be a good reason why the legislature should restrict the corporation to the one method of accomplishing the object; but when the power is granted without restriction as to the means, it does not, in our opinion, justify a court in saying that while the corporation has the power of using one means, it has not that of using another, though equally direct and well adapted to the accomplishment of the object, provided the funds are honestly applied; merely because it may afford greater facility for a misapplication. They might undoubtedly be misapplied in either case. Thus, what should prevent the city of Buffalo, having purchased a lot for a market, and given its bonds for it, from erecting a theatre instead of a market on the lot, if it was to be assumed that it was willing to pervert its funds and its credit to unauthorized purposes? Or, having purchased materials for a market, it might out of them erect a theatre. Or, having given its bond for the purchase of a lot, and the erection of a market, and then having raised by taxation the money to pay the bond, it might use the money to build the theatre, leaving the bond unpaid. This opportunity of misapplying the funds must exist under any method of executing the powers of a corporation. If one affords greater facility for it than another, the remedy is in restrictions by the legislature, and the selections of honest and capable agents by the people. But it affords no ground for a court to say that as a mere question of power, the corporation may not adopt the one method as well as the other; and it being established that a corporation may purchase upon credit such things as are necessary for the execution of its powers, we think it follows necessarily that it may borrow the money to pay for them, as that is one mode of purchasing upon credit.

Nor is the power of taxation conferred by the charter to be deemed to exclude the power of borrowing money. The case just referred to is an authority against such a proposition. It holds that, notwithstanding the power of taxation, the corporation may resort to its credit, not only for its ordinary current expenses, but for objects of a permanent character. The case of *Clark vs. School District*, 3 R. I., 199, is also in point. It was there held that a school district might borrow money to pay debts contracted for the erection of a school-house, and give its note therefor, and that its power of taxation was not to be construed as forbidding it to borrow money for a legitimate purpose. *Beers vs. Phœnix Glass Co.*, 14 Barb., 358, and *Mead vs. Keeler*, 24 Barb., 29, are also direct authorities in favor of the power of a corporation to borrow money, as incidental to the execution of its other powers. It was said on the argument, that it did not appear that the moneys received were all applied to municipal purposes. It does not appear how they were all applied, but we apprehend it would not be incumbent on the lender to show that they were properly applied. If the city had power to borrow money for legitimate purposes, a misapplication of the funds after they were obtained would not invalidate the contract. In *Bigelow vs. the City of Perth Amboy*, Dutch., 297, the city had purchased a quantity of flag-stone, for paving streets, and it was claimed that the charter had not been complied with, in respect to the proceedings preliminary to the paving by the city. But the court held that to be a question between the city and the lot owners, and they add: "But as between the creditors of the city and the corporation, the only question is whether the city agents, the mayor and council, had the power of purchasing the material in question. How the material was used, or whether it was used at all, is to creditor a matter of total indifference." So in a recent case in England, *Eastern Counties R. R. Co. vs. Hawkes*, 38 E. L. & E., 8, it was held that where the charter allowed the company to purchase lands for extraordinary purposes, a person contracting to sell them land was not bound to see that it was strictly required for such purposes, and that if he acted in good faith, without knowing of any intention to misapply the funds of the company, he might enforce the contract.

The principle of that decision would seem to warrant the proposition, that where a corporation has power to borrow money, a lender, acting in good faith, and supposing it to be borrowed for legitimate purposes, might recover, even though the corporation intended to devote it to objects unauthorized. And it would certainly sustain the position, that where it was borrowed for lawful objects, no subsequent misapplication of the funds could affect the rights of the lender, about which there is, in fact, no room even for the shadow of a doubt.

. . . . . .

Judgment reversed. Cause remanded with direction that the complaint be dismissed.

TOWN OF HACKETTSTOWN *v.* SWACKHAMER.

1874. 37 *New Jersey Law*, 191.

On rule to show cause.

Argued at June Term, 1874, before Beasley, Chief Justice, and Justices Bedle, Woodhull and Scudder.

For the defendants, *Pitney*.

For the plaintiff, *Vanatta*.

The opinion of the court was delivered by

Beasley, Chief Justice. The note, which is the subject of this suit, was given by the treasurer of the town of Hackettstown, in the name and behalf of the town, for money borrowed. This case, therefore, raises the question whether a municipal corporation, in the absence of an express power for that purpose, can contract for loans for the supply of its ordinary expenses.

At the present time it seems to be generally conceded, that a private corporation, constituted with a view to pecuniary profit, has, by implication, when not in this particular specially restricted, the power in question. The law was so held in this state, in the case of *Lucas* v. *Pitney*, 3 *Dutcher* 221, and the same rule has been repeatedly recognized in other decisions. And this result is the appropriate product of the principle that corporate powers, which are the necessary accompaniments of powers conferred, will be implied. In these instances the ability to borrow money is so essential that without it the business authorized could not be conducted with reasonable efficiency, and, as it cannot be supposed that it was the legislative intent to leave the company in so imperfect a condition, the inference is properly drawn that the power to raise money in this mode is inherent in the very constitution of such corporate bodies. Such a deduction is simply, in effect, a conclusion that the lawmaker designed to authorize the use of the means fitted to accomplish the purpose in view. It has been often said that the means which can be thus raised up by implication must be necessary to the successful prosecution of the enterprise, and that the circumstance that they are convenient will not legalize their introduction. But the necessity here spoken of does not denote absolute indispensableness, but that the power in question is so essential that its non-existence would render the privileges granted practically inoperative, or incomplete. It is, consequently, obvious that a presumption, resting on such a basis as this, must spring up in favor of almost the entire mass of commercial and manufacturing corporations, for without the franchise to effect loans, the chartered business could be but imperfectly transacted. And yet, even in such instances, the usual inference that such an implied power exists may be repelled by the language of the particular charter or the peculiar circumstances of the case. In a word, the rule of law

in question is nothing but the discovery, by the courts, of the legislative intent, such intent having been ascertained by a construction of charters, as applied to the subject matters.

Taking this as the ground of our reasoning, I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right cannot, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances it is not certainly indispensable as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. I do not wish to be understood as indicating that under certain special conditions an opposite deduction may not be legitimately drawn. It is plain that it is practicable to impose a duty on a municipality requiring the immediate use of large sums of money, and in such a situation the inference may become irresistible that it was intended that funds were to be provided by loans. My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly in the face of all experience to claim that the ordinary municipal operations cannot be efficiently carried on except with the assistance of borrowed capital. Without any help of this kind, it is well known that our towns and cities have long been, and are now being, improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for these purposes. Consequently I am unable to perceive any necessity to borrow money, under these conditions, from which the gift of such power to borrow is to be implied. It undoubtedly is clear that if, as has been asserted, the ends of the municipal charter can be conveniently reached, without a resort to the device of raising moneys by loan, there is not the least legal basis for a claim of the power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question cannot be called into existence by intendment, and as I claim the fact to exist I must, of necessity, reject the right of implication in question.

Nor is there anything in the language or in the frame of the present charter which would seem to favor the idea of the existence of an authority in the corporation to borrow money. It is in the ordinary fashion, giving the usual prerogatives of administration, improvement and police, and then follows the important clause, declaring

"that it shall be lawful for the common council, from year to year, to vote and raise by tax such sum or sums of money as they shall deem necessary and proper." Of course there can be no doubt with respect to the purposes to which the money thus authorized to be levied is to be applied. It is the means whereby the duties of local government are to be discharged. There is no limitation on the amount that may be raised. But there is a limitation on the method of raising it. It is not a general authority to raise money in any mode which the common council shall devise. The restriction is, it shall be raised "by tax." How can it be claimed, then, that it can be raised by loan? The power to borrow money is, in a certain sense, a larger power than that of raising money by taxation. There is, in the nature of the thing, an immediate check to excessive taxation; that is, the resistance of the parties taxed. There is none such in the power to borrow, for the immediate burthen of a loan is but slightly felt. Indeed, it is difficult to imagine any greater power that one person can confer upon another than an unlimited authority to borrow money. It is a common thing for an agent to have the right to contract debts in the name of his principal; but a very uncommon thing for such agent to be authorized to borrow money *ad libitum*. A more dangerous confidence could scarcely be given. If the municipal authorities under one of these charters, which in these days are so common, have this power to borrow, which is claimed for them, such power is practically unlimited. I see no limit to it, except the good sense, virtue and intelligence of the depositaries of it. It may be resorted to on all occasions in the management of the affairs of the city. The use of such a power might, at the will of the officials, be co-extensive with the corporate operations. All the usual enterprises and improvements could be undertaken on a basis of a credit, and annual taxation, instead of being made the basis and measure of annual expenditure, could readily be converted into a subordinate auxiliary to an extended system of loans. It is plain that such a power would be full of peril to the owners of city property, and the widest door would be thus thrown open to extravagance, recklessness and fraud. In my judgment, if such a system was judicially recognized, and such recognition was promulgated, almost every city in the state would be soon overwhelmed with indebtedness. Nor do I for a moment believe that a municipality could obtain from any legislature an unrestricted power to borrow money. It is probable that such a boon has never been solicited by any public corporation. Our statutory history evinces clearly that the power in question has been granted with a stinted hand and circumscribed by well defined limitations. My judgment is entirely averse to raising up this dangerous power by implication. If the rules of law compelled the court to make such implication, it seems to me such result would be largely injurious to the well-being of the state; and it is, therefore, a satisfaction to know such rules of law do not exist. The

authority to tax affords a sufficient source of funds requisite for all municipal purposes, and the consequence is there can be no inference of the existence of the superfluous power to borrow money for the same end.

An examination of the books will show that this question has not as yet received much judicial consideration. The courts of Wisconsin and Ohio have had this matter before them, and have arrived at a result the opposite of that which has just been stated. I have carefully weighed the arguments of these learned tribunals, but they have failed to convince my understanding. The cases referred to are those of *Mills* v. *Gleason*, 11 *Wis.* 470; and *Bank* v. *Chillicothe*, 7 *Ohio*, *part II*, 31. As a counterpoise to these views stands the weighty opinion of Judge Dillon, in his treatise on *Municipal Corporations*, *Vol. I*, § 81. Much emphasis is added to this expression of opinion, from the fact that this author had before him, at the time he wrote, the opposing cases just cited. In this state of the authority, it cannot be claimed that the principle is so settled that the judgment of this court cannot be freely exercised with respect to this important subject. My conclusion is that already expressed, that a right to borrow money is not to be inferred from any of the ordinary powers conferred in the charters of municipal corporations, and that, under ordinary circumstances, such a power can proceed only from an express grant to that effect.

Nor do I think that it adds anything to the right, to enforce the note in this case, that the money which it represents, and which was borrowed, has been expended in behalf of the corporation for legitimate purposes. The argument on this head was that, as the money had gone for the benefit of the corporation, the law, upon general principles, would compel its re-payment. If this is so, then the rejection of an implied power to borrow is of little avail. The doctrine, although repudiated in the abstract, would be ratified in the concrete. If this contention is tenable, it is impossible to close the eye to the fact that the loan, although held illegal and void in its inception, would thus, by a subsequent act, be rendered valid and enforceable. To style it, as was done in the argument, money had and received, would not change the real nature of the transaction. To permit a recovery of it in this secondary form would be, virtually and in truth, to effectuate a loan, and all the evils attendant on the power to borrow money in an unrestricted form, would supervene. And it is to be noted, that it is altogether a fallacy to argue that the law will raise an implied promise to repay the money after it has been used. The impediment to such a theory is, that the corporation has not the competency to make the promise thus sought to be implied. An express promise, to the effect contended for, would be illegal, and, therefore, clearly, the law will not create one by implication. It is not the case of a principal using money borrowed by his agent without authority, but it is the case of a principal who is

incapacitated by law from borrowing, and who, therefore, cannot legalize the act, either directly or by circuity. Perhaps a parallel instance would be presented in case of a loan to a married woman at common law, the money being used by her. Her promise to repay the loan would be void; and, from the fact of her having made use of the money, no implied promise in law could be deduced.

The lender of such money may, perhaps, have his redress against the officer of the corporation, who unjustifiably held himself out as possessed of the right to take the loan in the name and on the responsibility of the city, or by a recourse to equity, asking to be subrogated to the rights of those creditors who have received his money, instead of having their debts paid by the corporation. But even if the holder of this note should be remediless, the result is the same. No one can justly reproach the law for not providing him a remedy for his own folly or indiscretion. Such folly or indiscretion may have enabled the city officials to create a burthen, or may have stimulated them to acts of extravagance which would not have been otherwise created or done. It is but just that the individual who has occasioned the evil should bear the loss. But whether the owner of this paper be remediless or not, it is enough for the present purpose to say that there is no apparent ground on which this money, thus illegally loaned, can be recovered by an action at law.

The establishment of these general principles necessarily leads to a decision against the plaintiff in this case. But there are narrower grounds which would conduct to the same result.

On the admission that the common council, which is the ruling power of the corporation, had authority to contract the debt in question, it was not shown at the trial, with anything like legal certainty, that this loan was either authorized or ratified by such body. The treasurer obtained the money and gave the note. The proof of his authorization consisted in his statement that he had a "verbal authority to borrow money needed for the purposes of the town." This is entirely too loose. Such a power could not be transferred, except by a formal resolution, passed at a legal meeting of the council, or by an ordinance duly enacted. Nor was it shown that the fact of the money's having been expended for town purposes, was ever known to the council. The result is that, at the trial, there was proof neither of the authorization of the treasurer, or of ratification of his act. One of the essentials of the plaintiff's case was wanting to it. On this ground alone there must be a new trial.

The further question was discussed at the bar, whether a municipal corporation, lacking a special authority to that end, can execute a promissory note. I have examined the subject, but the views already expressed render it unnecessary to pronounce any final conclusion with respect to it, for the purposes of the present case. I may say, however, that my present view is, that a corporate body of this character, has the general and inherent right to execute a note as a voucher of

indebtedness, but that such note will not have the effect when in the hands of a *bona fide* holder before maturity, of cutting off the equities existing between the maker and payee. In this respect I fully concur in the learned opinion of Mr. Justice Bradley, recently read in the Supreme Court of the United States, in the case of *The Mayor* v. *Ray*, 19 *Wall.* 468.

Let a *venire de novo* be awarded.

GREAT FALLS BANK *v.* TOWN OF FARMINGTON.

1860. 41 *New Hampshire*, 32.[1]

Assumpsit on a promissory note of the defendants, signed by a majority of the selectmen, by order and in behalf of the town, originally payable to H. Rollins & Co., or order, in six months from date; and indorsed to plaintiffs. The note was given for liquors purchased by the town liquor agent upon the credit of the town; said agent so purchasing under verbal authority from the selectmen. The liquors were sold to the agent by Rollins & Co. in Massachusetts. Rollins & Co. were not licensed to sell liquors in Massachusetts, and the sale was in violation of the Massachusetts statute. The plaintiffs purchased the note for value, before maturity, and without any notice or knowledge of the consideration for which it had been given.

The foregoing facts appearing in evidence, a verdict was taken for plaintiffs; and the questions of law were reserved.

Wells & Eastman, for plaintiffs.

G. N. Eastman, *Christie & Kingman*, for defendants.

Fowler, J. By the express provisions of the act of July 14, 1855 (Laws of 1855, ch. 1658), it was made the duty of every city, town and place in this State to establish one or more agencies "for the purchase of spirituous and intoxicating liquors, and for the sale thereof within such city, town or place, to be used in the arts, or for medicinal, mechanical and chemical purposes; and wine for the commemoration of the Lord's Supper; and for no other use or purpose whatever." The selectmen were liable to indictment for refusing to appoint an agent, even where the town had refused to provide the means to purchase the stock in trade of the agency. *State* v. *Woodbury*, 35 N. H. 230.

The selectmen of Farmington, or the liquor agent by them appointed, might, therefore, properly purchase, upon the credit of the town, the liquors necessary to supply the agency which the selectmen were required to establish. The town was legally liable to furnish the agency with such liquors, their credit might be pledged to procure them, and the selectmen, as the general prudential and financial agents

[1] Statement abridged. Portions of opinion omitted. — Ed.

of the town, might, therefore, rightfully bind the town by a note given for the price of the liquors necessary for that purpose. It was within the scope of their authority as selectmen to bind the town by a contract to pay for liquors furnished the agency of the town by them established without any express authority from the town for that purpose. *Andover* v. *Grafton*, 7 N. H. 298; *Savage* v. *Rix*, 9 N. H. 265; *Glidden* v. *Unity*, 33 N. H. 571; *Hanover* v. *Weare*, 2 N. H. 131; *Hanover* v. *Eaton*, 3 N. H. 38; Ang. & Am. on Corp. 212, and authorities cited; Comp. Laws, ch. 36, sec. 2.

. . . . . .

The selectmen of Farmington having had authority to give the note in suit, and the plaintiffs being innocent indorsees and purchasers thereof for value before its maturity, in the ordinary course of business, without notice or knowledge of any illegality in its consideration, upon general principles, this action may well be maintained, notwithstanding the consideration of the note was the sale of liquors in violation of the statute of Massachusetts; for generally the illegality of the consideration of a negotiable promissory note is no defence to it in the hands of an innocent indorsee and purchaser for value. *Doe* v. *Burnham*, 31 N. H. 426, and authorities; *Crosby* v. *Grant*, 36 N. H. 273.

But the defendants contend that, although the general rule be as we have stated it, they stand upon a different footing, inasmuch as if they may be holden to pay this note to the plaintiffs, they are in a worse condition in relation to the debt than they would have been if a negotiable note had not been given for it, and therefore the selectmen had no authority to give the note. The position seems to rest upon a remark of *Parker*, J., in *Andover* v. *Grafton*, 7 N. H. 298, based upon the authority of *Slark* v. *The Highgate Archway Company*, 5 Taunt. 792; 1 E. C. L. 268.

[After stating the last named case.]

It is quite apparent that the whole extent of the authority of this case goes only to the point that corporations, like natural persons, are bound by the acts and contracts of their agents, only when those acts are done and those contracts are made within the scope of their authority; and that whenever a corporation is sued upon such a contract, whether it be a negotiable promissory note, or any other instrument, they are at liberty to show that the agents making it had no authority to execute it, in whosesoever hands it may be; because, if the agents had only a restricted authority, a contract made by them beyond its limits could impose no obligation on the corporation; and whoever takes a contract executed by an agent, takes it subject to the risk of the authority of that agent to execute it. This doctrine is too familiar to need the citation of authorities. The subject is fully discussed, and most of the American authorities are collected, in Ang. & Am. on Corp., 2d ed., 213, 216, 229, 233, 239–246.

It seems to us the decision in *Andover* v. *Grafton* can and does go

no farther than the principle to which we have adverted. It is true, the learned Judge *Parker* not only says: "An indorsee who should take such a note [one given by the selectmen of a town in behalf of the corporation], even before due, would receive it subject to a liability to make the same proof respecting the authority of the selectmen to execute it in that particular case, as would be required of the promisee;" but adds, "and of course must be chargeable with notice of all the facts, and the note in his hands be liable to the same defence as in the hands of the original promisee;" and then cites *Slark* v. *The Highgate Archway Company*, as authority to sustain his position.

It is undoubtedly true, as a general principle, that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of every thing to which such inquiry would naturally have led. Where a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. *Kennedy* v. *Green*, 3 Myl. & K. 719, 721, 722; *The Ploughboy*, 1 Gall. 41; *Hinde* v. *Vattier*, 1 M'Lean 118; *Bowman* v. *Walker*, 2 M'Lean 376; Sugd. Vend. & Purch. 1052, and cases cited; *Carr* v. *Hilton*, 1 Curt. C. C. 390; *Hastings* v. *Spencer*, 1 Curt. C. C. 504.

In the case before us this rule does not apply to the matter of defence relied upon. The note was signed by the selectmen for the defendant town, and therefore it was incumbent upon the plaintiffs to inquire whether it was signed by them within the scope of their authority, and given for a debt for which the credit of the town could properly be pledged by them, and this was all. They were not bound to inquire and ascertain whether or not the liquors purchased to enable the town to perform the duties imposed upon it by statute, were purchased in violation of a law of Massachusetts, or not, because that question was not one material to the authority of the selectmen to give the note. If they examined the statute under which the town acted, they found no special provision made for the supply of the town agents with liquors, and being satisfied that the note was given by the selectmen within the scope of their authority, for liquors actually received by the town to its own use, they were not required to go further, and inquire into the provisions of the statutes of another State, and into the question whether or not the sale of the liquors for the price of which the note was given was thereby prohibited; and if so, still further, whether or not our courts would enforce the prohibition here. They had no notice of any such facts, nothing to call their attention to them and put them upon their guard in relation to them.

To hold that if the defendants would be worse off in defending against the note, than they would have been in defending against the account for which it was given, the selectmen had no authority to give it, would make the authority of the agents depend upon the result of subsequent proceedings against their principal, and not

upon the question whether or not they were acting at the time of the transaction within the range of their legal authority. This would be quite absurd. If the selectmen had authority to give a negotiable note for the debt incurred in the purchase of liquor for the town agency, they had that authority none the less, because, upon well established principles, that note in the hands of a *bonâ fide* indorsee for a valuable consideration, without notice and before maturity, might not be open to some defences to which it might have been subject in the hands of the original payee, or which might have been made to a suit to enforce the debt for which the note was given. The town is a corporation, and like all other corporations must be subject to the same rules of law as are applicable to individuals. It is well settled that an individual who gives his note for liquors sold in violation of law, cannot be permitted to show the illegal consideration as a defence to a suit upon the note by an actual purchaser thereof before maturity and without notice. Whether he gave the note personally, or by an authorized agent, could make no difference. So it must be with a town or other corporation. The fact that the note is executed by an agent is apparent upon its face; of course the purchaser has notice, and buys the note at the risk of the authority of the agent to give it, but this is all. He has no notice, express or implied, of any illegality in the consideration, or in the sale whereby the debt was created for which the note was given, and is not therefore to hold it subject to any defence of that character.

With these views, there must be

Judgment upon the verdict.

CITY OF BRENHAM *v.* GERMAN AMERICAN BANK.

1892. 144 *U. S.* 173.[1]

Error to U. S. Circuit Court for Western District of Texas.

Action by bank against the city of Brenham to recover upon coupons cut from negotiable bonds issued by it. The act incorporating the city contains the following provisions: —

Art. 3, Sect. 2: "That the city council shall have the power and authority to borrow for general purposes not exceeding ($15,000) fifteen thousand dollars on the credit of said city."

Art. 7, Sect. 1: "Bonds of the corporation of the city of Brenham shall not be subject to tax under this act."

The Texas Constitution of 1876 provides that no city "shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; . . ."

[1] Statement abridged. Portions of opinions omitted. — Ed.

The bonds in question, to the amount of $15,000, were issued in 1879, " for general purposes," under a city ordinance.

The plaintiffs claimed to have the rights of *bona fide* purchasers, for value, before maturity.

Upon the trial the court charged the jury, that the power in the city to borrow money carried with it the authority to issue the bonds, and that the defendant had capacity to issue the bonds in question as commercial paper, and bind itself to pay them and the coupons. To this ruling, the defendant excepted. Verdict for plaintiff, and judgment thereon.

S. R. Fisher, for plaintiff in error.

A. H. Garland and *Henry Sayles*, for defendant in error.

BLATCHFORD, J. . . . The principal contention on the part of the defendant is that it was without authority to issue the bonds, and that they were void for all purposes and in the hands of all persons.

. . . . . .

There is nothing in the charter of the defendant which gives it any power to issue negotiable, interest-bearing bonds of the character of those involved in the present case. The only authority in the charter that is relied upon is the power given to borrow, for general purposes, not exceeding $15,000, on the credit of the city. . . .

That in exercising its power to borrow not exceeding $15,000 on its credit, for general purposes, the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper, is quite clear; but that does not cover the right to issue negotiable paper or bonds, unimpeachable in the hands of a *bona fide* holder. In the present case, it appears that Mensing bought from the defendant $5000 of the bonds at 95 cents on the dollar, and that other $7000 of the bonds were sold by the city for the same price, it thus receiving only $11,400 for $12,000 of the bonds, and suffering a discount on them of $600. The city thus agreed to pay $12,000, and interest thereon, for $11,400 borrowed. This shows the evil working of the issue of bonds for more than the amount of money borrowed.

It appears by the record that depot grounds in, and the right of way through, the city of Brenham were bought for the Gulf, Colorado and Santa Fé Railroad Company with money realized from the sale of bonds issued under the ordinance of June 7, 1879, and that $3000 of such bonds were used by the city for fire department purposes.

The power to borrow the $11,400 would not have been nugatory, unaccompanied by the power to issue negotiable bonds therefor. *Merrill* v. *Monticello*, 138 U. S. 673, 687; *Williams* v. *Davidson*, 13 Texas, 1, 33, 34; *City of Cleburne* v. *Railroad Company*, 66 Texas, 461; 1 Dillon on Municipal Corp. 4th ed. § 89, and notes; § 91, n. 2; § 126, n. 1; §§ 507, 507 *a*.

The confining of the power in the present case to a borrowing of money for general purposes on the credit of the city, limits it to the

power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum, semi-annually, for at least ten years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case.

A review of the cases on this subject in this court will be useful.

[The learned Judge then cited, and commented upon, *Rogers* v. *Burlington*, 3 Wallace, 654; *Mitchell* v. *Burlington*, 4 Wallace, 270; *Police Jury* v. *Britton*, 15 Wallace, 566; *Claiborne County* v. *Brooks*, 111 U. S. 400; *Concord* v. *Robinson*, 121 U. S. 165; *Kelley* v. *Milan*, 127 U. S. 139; *Norton* v. *Dyersburg*, 127 U. S. 160; *Young* v. *Clarendon Township*, 132 U. S. 340; and *Hill* v. *Memphis*, 134 U. S. 198. He quoted, *inter alia*, the statement of Mr. Justice Bradley in *Police Jury* v. *Britton* — that it was one thing for county and parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations, which might be multiplied to an indefinite extent.]

In *Merrill* v. *Monticello*, 138 U. S. 673, 687, 691, it was held that the implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if existing at all, did not authorize it to create and issue negotiable securities to be sold in the market and to be taken by the purchaser freed from the equities that might be set up by the maker; and that to borrow money, and to give a bond or obligation therefor which might circulate in the market as a negotiable security, freed from any equities that might be set up by the maker of it, were essentially different transactions in their nature and legal effect. In the opinion of the court, which was delivered by Mr. Justice Lamar, the cases of *Police Jury* v. *Britton*, *Claiborne County* v. *Brooks*, *Kelley* v. *Milan*, *Young* v. *Clarendon Township* and *Hill* v. *Memphis* were cited with approval. It was added: "It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond,

as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name."

The opinion then stated that the logical result of the doctrines announced in the five cases which it cited clearly showed that the bonds sued on in the case of *Merrill* v. *Monticello* were invalid, and added: "It does not follow that, because the town of Monticello had the right to contract a loan, it had, therefore, the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case, all that can be contended for is, that the town had the power to contract a loan, under certain specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality. It is true that there is a considerable number of cases, many of which are cited in the brief of counsel for plaintiff in error, which hold a contrary doctrine. But the view taken by this court in the cases above cited and others seems to us more in keeping with the well recognized and settled principles of the law of municipal corporations."

We, therefore, must regard the cases of *Rogers* v. *Burlington* and *Mitchell* v. *Burlington* as overruled in the particular referred to, by later cases in this court. See 1 Dillon's Mun. Cor. 4th ed. §§ 507. 507 *a*.

. . . . . .

We cannot regard the provision in the charter of the city, that bonds of the corporation of the city "shall not be subject to tax under this act," as recognizing the validity of the bonds in question. Whatever that provision may mean, it cannot include bonds unlawfully issued.

As there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their coupons. *Marsh* v. *Fulton County*, 10 Wall. 676; *East Oakland* v. *Skinner*, 94 U. S. 255; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Hayes* v. *Holly Springs*, 114 U. S. 120; *Daviess County* v. *Dickinson*, 117 U. S. 657; *Hopper* v. *Covington*, 118 U. S. 148, 151; *Merrill* v. *Monticello*, 138 U. S. 673, 681, 682.

As the action here is directly upon the coupons, and there is no right of recovery upon them, the judgment must be

Reversed, and case remanded to the Circuit Court, with a direction . . . to enter . . . a general judgment for the defendant.[1]

HARLAN, J. (with whom concurred BREWER, J., and BROWN, J.), dissenting.

[After reviewing various cases cited in the majority opinion.]

It thus appears that in no one of the above cases, decided since *Rogers* v. *Burlington*, was there any question as to negotiable securities being issued under an *express* power to *borrow* money; and that some of them concede that such a power carries with it authority to give a negotiable paper for money borrowed.

The case which seems to be much relied upon to support the present judgment is *Merrill* v. *Monticello*. But we submit that it does not sustain the broad doctrine that negotiable securities may not be issued in execution of an *express* power to *borrow money*. What could or could not be done, under such a power, was not a question involved in that case. The question was whether authority in the town of Monticello to issue negotiable bonds could be *implied*, not from an express, but from an *implied* power to borrow money.

[After commenting upon *Merrill* v. *Monticello*, 138 U. S. 673, and *City of Savannah* v. *Kelly*, 108 U. S. 184.]

It is, perhaps, proper to say that our views find support in the admirable commentaries of Judge Dillon on the Law of Municipal Corporations. The court refers to sections 507 and 507 *a* of those Commentaries. But those sections do not, in any degree, support the conclusion reached in this case. The doctrine which the learned author declares, in those sections, to be alike unsound and dangerous, is, "that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper which cuts off defences when it is in the hands of a holder for value acquired before it is due." But Judge Dillon, while agreeing that the power to issue commercial paper, unimpeachable in the hands of a *bona fide* holder, is not among the ordinary *incidental* powers of a public municipal corporation, and must be conferred expressly, or by fair implication, says, after a careful review of the authorities: "*Express power to borrow money*, perhaps, in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to aid railways and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability."

[1] In 144 U. S. 549, a petition for rehearing was denied; but the above order was modified. The judgment below was reversed, and the cause was remanded for further proceedings not inconsistent with the above opinion of BLATCHFORD, J. — ED.

1 Dillon's Mun. Corp. § 125, 4th ed. It is eminently just to apply that rule in the present case, because the act giving the city of Brenham authority to borrow, not exceeding $15,000, for general purposes, expressly provided that its *bonds* should not be subject to tax under that act. Such a provision could have had reference only to negotiable bonds, which would be put upon the market for the purpose of raising money.

It seems to us that the court, in the present case, announces for the first time that an express power in a municipal corporation, to borrow money, for corporate or general purposes, does not, under any circumstances, carry with it, by implication, authority to execute a negotiable promissory note or bond for the money so borrowed, and that any such note or bond is void in the hands of a *bona fide* holder for value. There are, perhaps, few municipal corporations anywhere that have not, under some circumstances, and within prescribed limits as to amount, express authority to borrow money for legitimate, corporate purposes. While this authority may be abused, it is often vital to the public interests that it be exercised. But if it may not be exercised by giving negotiable notes or bonds as evidence of the indebtedness so created — which is the mode usually adopted in such cases — the power to borrow, however urgent the necessity, will be of little practical value. Those who have money to lend will not lend it upon mere vouchers or certificates of indebtedness. The aggregate amount of negotiable notes and bonds, executed by municipal corporations, for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country, must be enormous. A declaration by this court that such notes and bonds are void, because of the absence of *express* legislative authority to execute *negotiable* instruments for the money borrowed, will, we fear, produce incalculable mischief. Believing the doctrine announced by the court to be unsound, upon principle and authority, we do not feel at liberty to withhold an expression of our dissent from the opinion.

Sec. 9544-45-46, R. S. 1909, deal with power of city to contract a debt: City may contract a debt by written contract; bonds may be issued.

CHAPTER V.

EXPRESS RESTRICTIONS ON THE POWER TO BECOME INDEBTED.

CITY OF VALPARAISO *v.* GARDNER.

1884. 97 *Indiana*, 1.[1]

From the Porter Circuit Court.

E. D. Crumpacker, *H. A. Gillett*, and *A. D. Bartholomew*, for appellants.

W. Johnston, for appellee.

Elliott, C. J. The complaint of the appellee avers that he is a resident taxpayer of the city of Valparaiso; that the municipal officers are about to let a contract to a water-works company for supplying the city with water for a period of twenty years, at an annual expense to the municipality of $6,000; that the corporate indebtedness exceeds five per centum of the assessed value of the taxable property of the city and that there is no money in the treasury. The prayer of the complaint is for an injunction restraining the corporate authorities from entering into the contract.

The appellants answered, admitting that the appellee was a taxpayer; that the city was indebted in excess of two per centum of the aggregate value of the taxable property, and averring that the city has a population of over five thousand persons and is rapidly increasing in population; that it has no facilities for extinguishing fires except three cisterns, which are wholly inadequate, and that the safety of the city demands that the contract mentioned in the complaint be entered into and a supply of water secured; that the assessed value of taxable property, as shown by the assessment roll, amounted to $1,350,000; that from other sources than taxation the revenue of the city is $2,500 per annum; that the ordinary current expenditures are less than $6,000 per annum, and that the annual revenues of the city are sufficient to pay all the ordinary expenditures of the city and the water rent of $6,000 per annum, besides providing for the accumulation of a sinking fund, as the law requires; that the intention was that the terms of the proposed contract should be so adjusted that when the water-works were completed and an instalment of rent earned, there would be money sufficient in the treasury to pay it, derived from current revenues, and to so fix the time of the payment

[1] Portions of opinion omitted. — Ed.

of future instalments that they should be within the current revenues of the city, and yet leave money sufficient to meet all other corporate expenses.

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In 1881 an amendment to the Constitution was adopted, in which this provision is incorporated: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate, exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void." This provision received consideration in *Sackett* v. *City of New Albany*, 88 Ind. 473, but the question there presented and decided was very different from that which here faces us. The point decided in that case was that a city could not issue bonds for current expenses where there were no funds in the treasury and the existing indebtedness exceeded two per centum of the value of the taxable property of the municipality. There the question was not whether the claim which the municipal officers were about to pay in bonds was or was not a debt within the meaning of the Constitution; while here that is the question, so that we come to the decision of this case unfettered by any former adjudication of this court.

The question is a grave one, and not entirely without difficulty. If we hold that the contract to pay an annual water rent of $6,000 during a period of twenty years creates a debt for the aggregate sum of $120,000, and is a debt within the prohibition embodied in the Constitution, we should lay down a principle that would, in a great majority of instances, put an end to municipal government. If it be true that an agreement to pay a given sum each year for a long period of years constitutes a debt for the aggregate sum resulting from adding together all the yearly instalments, then it is extremely doubtful whether there is a city in the State that has authority to repair a street, dig a cistern or build a sidewalk, for nearly every city has contracts for gas and water supplies running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit of two per centum on the value of taxable property. We know, as matter of general knowledge, that water-works and gas-works require the outlay of enormous sums of money, and that such enterprises are not undertaken under contracts running for short periods of time. If the aggregate sum of all the yearly rents is to be taken as a debt within the meaning of the Constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the rigor of the words used, that the framers of the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities or

to leave them without water or light. Nor are we to presume that the electors were ignorant of the existence, condition and necessities of our great towns and cities. On the contrary, we are to presume that these things were known to the electors, and that they intended to foster the best interests of these instrumentalities of local government. An error frequently finds its way into trains of reasoning from the assumption, often made, that the officers are the corporation. This assumption is radically erroneous, for it is the inhabitants, and not the officers, who constitute the public corporations of the land. Grant Corp. 357; *Lowber* v. *Mayor, etc.*, 5 Abbott Pr. 325. *Clarke* v. *City of Rochester*, 24 Barb. 446. To deny the right to procure water and light is to deny it to the inhabitants of the towns and cities, and these form no inconsiderable part of the population of the State. We cannot, therefore, by mere intendment declare that the electors of the State meant to lay down a rule that should practically take from the inhabitants of our cities the power to supply themselves with water or light. To reach the conclusion that they meant to do this, we must find clear warrant in the language of the constitutional provision itself. We agree that if it be found that the language used is clear and explicit, we must give it effect, no matter how disastrous the consequences may be. While it is our duty to yield to the words of the Constitution, still, in determining what meaning they were intended to have, it is proper to consider the circumstances under which the provision was adopted and the object it was intended to accomplish. Cooley Const. Lim. (5th ed.) 78, 79.

In view of the warring among the adjudged cases it is not easy to affirm that the word "debt" has a firmly settled meaning. In one case it was said, "But the compensation to this contractor was not a debt within the sense of this provision, until the service was performed and the contractor was entitled to be paid. It was, no doubt, an obligation, in some sense, from the time the contract was entered into, but it was not a debt in the popular sense" of the term. *Weston* v. *City of Syracuse*, 17 N. Y. 110. A similar definition is annexed to the word in the opinion of the court, written by the eminent jurist, Judge DENIO, in *Garrison* v. *Howe*, 17 N. Y. 458. It was said in *Wentworth* v. *Whittemore*, 1 Mass. 471, "but whenever it is uncertain whether anything will ever be demandable by virtue of the contract it cannot be called a debt." By the Supreme Court of California it was said: "A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened." *People* v. *Arguello*, 37 Cal. 524. In *Sackett* v. *City of New Albany*, *supra*, this language was used: "By 'indebtedness,' in this connection, we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement." Conceding that there are cases giving the word "debt" a somewhat

different meaning from that affixed to it by these authorities, still they are sufficient to prove, at least, that the word cannot be said to have a firmly settled meaning. It is not necessary for us to decide that the meaning given the word in the cases cited is that which the word invariably possesses, for it is sufficient for our purpose to assume that its meaning is not so fixed and definite as to forbid construction. The word used in the constitution is "indebted," but without ascertaining what the word "debt" means we cannot affix a meaning to that word, for its popular meaning is "placed in debt," or as Worcester puts it, "being in debt." It is obvious that a corporation owing no debt cannot be indebted.

Our leading purpose is, therefore, to ascertain what meaning the authors of the Constitution intended the word "indebted" to have, and we address ourselves to its accomplishment. It is clear that if the city should fail to perform its contract, the recovery would be for damages for a breach of contract, and not the contract rate of compensation, and, therefore, it cannot be true that the whole of the compensation is certainly demandable by the corporation with which it contracts. It may be that but a small part of even one year's compensation can be recovered. On the other hand, the failure of the water company to perform may put an end to the contract, and that would, of course, terminate all liability of the municipal corporation. There could be no action maintained against the city for the recovery of compensation under the contract without evidence that the water had been furnished, and this proves that there is no indebtedness until the water has been supplied in accordance with the terms of the contract.

The effect of the proposed contract is that the city shall be liable for water as it is furnished and not before. It is not until after the water has been furnished that there can be justly said to be a debt, for, while there might be a liability for damages, in case of a breach on the part of the city, there is certainly none under the contract until the city has received that for which it contracted. If it can pay this indebtedness when it comes into existence, without exceeding the constitutional limitation, then there is no violation of the letter, and surely none of the spirit of the Constitution. We are careful to say when the debt comes into existence, and not to say when it becomes due, for between these things there is an essential difference. The object to be accomplished by the amendment, the condition and necessities of our municipalities, as known to the authors of the amendment, and the just force of the language employed, authorize us to conclude that the inhibition of the Constitution does not apply to contracts for water to be paid for as the water is furnished, provided it is shown that the contract price can be paid from the current revenues as the water is furnished and without increasing the corporate indebtedness beyond the constitutional limit.

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The question was very fully discussed in *Grant* v. *City of Davenport*, 36 Iowa, 396, where it was held that a contract entered into by the city for the supply of water for a term of years, at an annual rental, is one relating to the ordinary expenses of the city, and that the annual rental is not an indebtedness within the meaning of the Constitution. One of the illustrations used in the course of the opinion is so apt that we quote it: "Suppose a man having a family to support is without other means to do it, except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore makes a lease for ten years at $300 per year, or $3,000 for the term, the rent being payable monthly, quarterly or annually. Has that man created an indebtedness of $3,000?"

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We have assumed that the supply of water is necessary to the welfare of the inhabitants of the municipality, and that it constitutes one of the items of current expenditure essential to the welfare of the corporation, and this assumption rests upon the facts pleaded in the answer. This distinguishes the case, as is well shown in *Grant* v. *City of Davenport*, *supra*, from the cases in which property is purchased or subscriptions made to the capital stock of railroad or other corporations. It is the items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purposes even though the effect be to postpone judgment creditors. *Coy* v. *City Council*, 17 Iowa, 1; *Coffin* v. *City Council*, 26 Iowa, 515; *Grant* v. *City of Davenport*, *supra*. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate life, there cannot be said to be any debt. We do not assert that a debt may be created even for current expenses, if its effect will be to extend the corporate indebtedness beyond the constitutional limit, but we do assert that where the current revenues are sufficient to defray all current expenses without increasing the indebtedness, there is then no corporate debt incurred for such expenses. To illustrate our meaning, suppose a laborer is employed on the first day of April to render services on the first day of May, that on the day of the employment there is no money in the treasury, but on the first day of May, when the services are rendered, there will be more than enough yielded by the current revenues, there is in such a case really no debt. Again, suppose that on the first day of April gas is needed for that month, and that on each day of that month the current revenues are sufficient to pay each day's gas bill, there will be no debt even though there was not sufficient money to pay the month's account in the treasury on the day the contract was made. Such contracts do not create a debt prior to the rendition of the services in the one case, or to the furnishing of gas in the other; they

simply devote to current expenses current revenues. While, as decided in *Sackett* v. *City of New Albany*, *supra*, the debt cannot be made to exceed the constitutional limit even for current expenses, no matter how urgent, yet current revenues as they come in may be used to defray such expenses, and if they are sufficient for that purpose, then no debt is created.

If a bond, note, or other obligation is executed, then, doubtless, a debt is created, for such things constitute evidences of indebtedness, but that is not the case here. So, if the consideration of the contract is received at once, instead of being yielded in the future or at intervals, then it might be said that there was a debt, but where there is nothing owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary yearly expenses of the municipality, there will be no debt, if, when the thing is done or furnished there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim without encroaching upon other funds. This we understand to be the case made by the answer, and we think it a case not within the inhibition contained in the constitutional amendment.

If a different view be taken from that which we maintain, startling results would follow in the application of the principle to other cases. Take, for instance, a merchant having a large number of clerks employed for a year each, and at a fixed salary, could such a merchant in making out his tax-list deduct the aggregate amount of all the salaries computed to the end of the year, on the ground that it constituted an indebtedness? Take, again, the same supposed case, and would any one say that the merchant's solvency was to be determined by taking into consideration the aggregate of the salaries that would be due his clerks at the end of the year? Take, for another example, the case of a private corporation actively engaged in business, could it be pushed to the wall on the ground that it was insolvent, by evidence that it had contracted with a large number of men for a year's service, and that the aggregate sum due at the end of the year would be much greater than the value of its property at the opening of the year? Take still another example, a municipal corporation — and here there need be no supposition — with its officers (some of them with terms of several years), its policemen and its firemen, is it indebted at the beginning of the year, for the grand aggregate of all the salaries to the end of all the terms? In the case of the merchant and of the private corporation, it certainly would be held, without hesitation or doubt, that if the current income or profit would discharge the obligations there would be no indebtedness; and this must be true of municipal corporations in cases where there will be money in the treasury, derived from current revenues, sufficient to pay for services rendered or things furnished, as part of the current corporate expenses, when the services are rendered or the things actually furnished. Expenses of such a character should be deemed

incidental expenses of the corporate business, and not debts, and as long, at least, as the current revenues will pay these expenses without taking from funds devoted to other purposes by command of the corporate charter what properly belongs to them, there is no indebtedness within the meaning of the Constitution.

Judgment reversed, with instructions to overrule the demurrer to the answer, and to proceed in accordance with this opinion.

SPILMAN *v.* CITY OF PARKERSBURG.

1891. 35 *West Virginia*, 605.[1]

J. B. Jackson and *J. A. Hutchinson*, for appellants. [Citations of counsel omitted.]

B. M. Ambler, for appellee.

HOLT, J. Article 10, section 8, of the Constitution of West Virginia, provides that "no county, city, school district or municipal corporation shall hereafter be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; nor without at the same time providing for the collection of a direct annual tax, sufficient to pay annually the interest on such debt and the principal thereof within, and not exceeding, thirty-four years; provided, that no such debt shall be contracted under this section unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." This suit involves this provision of the state constitution, and is a bill in equity, filed in the circuit court of Wood county on the 9th day of April, 1891, by B. D. Spilman, who sues on behalf of himself and all other citizens, residents and tax-payers in and of the city of Parkersburg, W. Va., against the city of Parkersburg and others, to restrain and inhibit the creation by the city of a debt for the erection of an electric light plant, alleged to be in violation of the above-mentioned section of the state constitution. The injunction was granted on May 25, 1891, until further order, and thereupon defendants gave notice of motion to be made on June 22, 1891, to dissolve, on which day the judge in vacation heard the motion, but overruled the same, refusing to dissolve the injunction, and from this order defendants below, plaintiffs in error, having obtained this appeal.

The facts are as follows: The total valuation of the taxable property on the 10th day of November, 1890, ascertained by the last

[1] Portions of opinion omitted. — ED.

assessment in the city for state and county taxes, was $3,818,120 — five per cent of which is $190,906. The then existing indebtedness of the city was $190,000. On the 18th day of March, 1891, the Thomson-Houston Electric Company entered into a written contract of that date, whereby the electric company agreed to erect and install for the city a certain electric plant in accordance with specifications attached and made part of the contract, for which the city agreed to provide a suitable site, boiler and foundation for engine and dynamos, to pay all taxes on such apparatus and plant, and keep the same in repair, and also agreed to lease from the electric company such plant, furnished for street lighting, for a term of five years from the completion of the plant, and to pay at the end of each three months after its completion — that is to say, quarterly — the sum of $1,625 for the use thereof, except that each succeeding payment was to be $18.75 less than the preceding payment; and at the expiration of the term of five years the city has the right to buy the same at the price of $1 — plainly a contract of purchase in legal effect; in fact so designated twice in a paper made part of the contract. No question connected with this transaction was submitted to the people; no vote was had thereon. In addition, there were in November, 1890, funds receivable from licenses, etc., the sum of $17,444.53.

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Blackstone (vol. 3, p. 154) says: "The legal acceptation of debt is a sum of money due by certain and express agreement." This is given in connection with his treatment of the action of debt.

In the constitution it means any debt created by contract, express or implied; any voluntary incurring of any liability to pay in any manner or for any purpose, when the given limit of indebtedness has been reached. It may be a debt payable in the future as well as one payable presently; one payable upon some contingency, such as the delivery of property, as well as for property already delivered. When the contingency happens, the debt becomes fixed; it exists. It only differs from an unqualified promise in the manner in which it is created. And, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else."

I do not deem it necessary to review *seriatim* the many cases on the subject, but rather, with their help, make a careful analysis of our own constitutional provision on the point.

1. What kind of indebtedness is prohibited? "If a man have any more or less of meaning in the term he makes use of than another, he does not talk with him to the same point." By the term "indebtedness," as here used, is meant the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time for something already received, or for something yet to be furnished or rendered. This includes every kind of indebtedness, no matter in what manner created, or volun-

tarily brought about; or for what purpose, whether it be for municipal self-preservation or not; whether for pure air, pure water, good light, clean and convenient and safe streets and sidewalks; whether it be payable now or hereafter, payable quarterly or annually, or at any date running on for thirty-four years; whether for current expenses or fixed and definite debts or charges; whether for personal property or real property, leasehold or freehold. It is none the less indebtedness, created in some manner, and for some purpose, and is within the purview and the bar of the constitution. The confusion as to "current expenses" grows out of the failure to give due weight to another part of section 8, article 10.

2. Provision for payment. The city shall "at the same time provide for the collection of a direct annual tax sufficient to pay annually the interest on such debt, and the principal thereof within and not exceeding thirty-four years." If it is an item of current expenses or any thing else for the payment of which provision has already been made by levy laid, then it needs no other provision for its payment, and is not within the letter of the constitution; neither is it within its true meaning, for a draft on a fund already in hand, or by levy already made and provided, meets it and discharges it, so that no indebtedness arises. Thus it happens that the mere coincidence of current expenses being generally met and discharged by a fund in hand or already levied for is apt to mislead us into the view that indebtedness to pay current annual expenses is not within the prohibition; whereas, as we have seen, it is as absolutely prohibited as indebtedness created in any other manner or for any other purpose. This clause of the section is for the benefit of the creditor.

3. "Shall not hereafter be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This provision is intended, by fixing a maximum limit in any and all events, to guard the people of the town from their own thoughtlessness or recklessness as to the burden put upon others, the large tax-payers being generally in the minority. It is intended to protect posterity by its limit as to time, and the tax-payers by its limit as to quantity.

4. "Not exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This gives us a precise and definite standard by which to measure and ascertain the extent to which the indebtedness may go and we see that it does not include tithables, nor licenses, nor market fees, nor wharfage, nor police court fines, nor bridge tax, etc.

5. "Provided, that no debt shall be contracted under this section,

unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same," plainly intending that no such indebtedness should be created in a corner, and without the knowledge and sanction of the tax-paying voters. It should be public, and run the gauntlet of full and free discussion. The people must be in earnest about this matter, or they would not by their organic law have barred out this debt-creating power with a triple hedge of safeguards. Its wisdom is unquestioned, and it has found or is rapidly finding its way into all state constitutions. It is plainly remedial; therefore the courts should uphold it with a steady hand, and construe and apply it in the advancement of the benefit sought for, and in suppression of the evil intended to be suppressed, and not give up the citadel to the first hard case, with bad law in its train, that demands its surrender. When we apply this section, thus read and construed, to the facts of the case in hand, we find this electric contract unable to penetrate even the outer wall.

1. What matters it what we call the thing contracted for, or the contract itself — lease, purchase or executory contract to lease or purchase — the thing thus created is a debt. It is executory; it may never be carried out. None the less it is a present binding agreement for the creation of a prospective debt.

2. The five per cent limit was already reached — it may lack a trifle, but virtually reached. The maximum measure is full. There is room for no more indebtedness. We are not permitted to piece on to the last aggregate tax value the $17,000 or $20,000 derived from city licenses, police fines, etc., in order to broaden the five per cent fund by enlarging the basis from which it is calculated, so as to make room for another debt. The constitution does not say so, but by what it does say excludes it. Why not take this fund, and buy the electric apparatus? Then there would be no debt. Not being capable of being used to enlarge the basis of calculation at the one end, neither can it be used to belittle the debt at the other, to make it insignificant, compared with the means of payment. To say that it is sufficient to pay with will not do. It must be applied; and when that is done the dispute is ended.

3. The people have had no say in the matter, they have not voted, nor had an opportunity to vote. The right of the city to create indebtedness is exhausted. The indebtedness amounts to $190,000; the maximum limit is $190,850.50 — leaving a margin of $850.50.

4. On behalf of the city authorities it is urged with a good deal of force that this is a contract for light — one of the public necessities of city life; that to provide it is one of the urgent items of current expense; that a modern plant cannot be obtained by yearly contract; that it is so costly that no one will take the risk of supplying it in that way, but that the only obtainable terms are for a term of years, say five at the least, with quarterly or annual payments; and that as the

rent or installments of purchase-money fall due only as the compensation has been earned, the funds are by that time in the treasury with which to pay. All this sounds plausible enough, but the trouble with it is no levy has been made to meet it; no provision has been made or can be made for a direct annual tax sufficient to pay it, because the indebtedness already existing is up to the maximum allowed by law; and the contract does not restrict its source of payment to current funds derivable from sources other than taxation, such as licenses, police fines, etc., if that would avoid the trouble (as to which we express no opinion). That may be one of the sources of revenue already set apart or relied on to pay interest and principal of the $190,000 of city indebtedness already existing. The city is rapidly increasing in taxable wealth, no doubt, but the constitution requires us to take as the basis the last assessment, and that is before us among the facts of the case, and we are not allowed to look ahead to some conjectural assessment not yet made.

I have examined all these cases of "necessary current expenses," as they are called, to which our attention has been directed; examined some of them in a perfunctory manner it is true, for no man nowadays can deliberately read every thing. [After citing a large number of authorities.] I need not stop to compare and distinguish; that has been well done in 1 Dill. Mun. Corp. (4th Ed.), § 133 et seq., and notes. And I have been led to the conclusion that the safe and sound construction is laid down in the much-considered case (three times before the court) of Prince v. City of Quincy, 128 Ill. 443 (1889); 21 N. E. Rep. 768. "The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on their corporate operations while so indebted upon the cash system, and not upon credit to any extent or for any purpose;" that is, payment must be provided for by levy laid, as distinguished from levy hereafter intended to be laid. "If an indebtedness of a city for current expenses and supplying water is forbidden as being in excess of the constitutional limit, the contract upon which it arose, though in itself executory, and creating only a contingent liability, is also forbidden. Prohibition of the end is prohibition of the direct, designed and appropriate means." This is the true construction. Any other would deprive these constitutional limitations of the force and efficiency indispensably required to prevent or cure the evil aimed at. To this conclusion the learned judge of the circuit court who entered the order complained of was brought, no doubt, after a careful consideration of all the authorities. I regard his conclusion as the only safe and sound one. We are working in constitutional harness in the piping times of peace, and do not feel called on to heed the exacting imperiousness of these higher laws of municipal self-preservation; but are forced to say what he has in effect said: "The city fathers, when the constitutional limit of voluntary indebtedness, as in this case, has been reached, must for the time cast about in search of the philoso

pher's stone, 'pay as you go.'" Therefore, the order of the circuit court of Wood county, entered by the judge in vacation on the 22d day of June, 1891, overruling defendants' motion to dissolve the injunction awarded on the 25th day of May, 1891, is affirmed.

RAUCH *v.* CHAPMAN.

1897. 16 *Washington*, 568.[1]

APPEAL from superior court, Klickitat county.

W. B. Presby and *Huntington & Wilson*, for appellant.

C. H. Spalding, for respondent.

REAVIS, J. Suit in equity, by a taxpayer of Klickitat county, against the county treasurer to enjoin the payment of certain county warrants, on the ground that they were issued after the constitutional limitation of county indebtedness had been incurred. The complaint, after other necessary allegations, set forth that the indebtedness of the county was more than one and one-half per centum of the taxable property therein, and no validation by vote of the electors had been made of any additional indebtedness. The answer stated, among other defenses to the suit, that the warrants in controversy were compulsory obligations imposed upon the county by the constitution and laws of the state; and specified some of the purposes for which the warrants were issued, among which were services for jurors in the superior court, witness fees in criminal proceedings, and sheriff's expenses in serving criminal process, and expenses incurred at the general state election. Plaintiff demurred to this affirmative defense, which demurrer was sustained by the superior court, and the court thereupon, among other facts, found the following, which are material to the consideration of the cause by this court:

"7th. That the total indebtedness of said county on the 9th day of March, 1893, and during all of the time of the issue of the warrants now called was $85,441.92, and greatly exceeded the constitutional limit of indebtedness for said county, after deducting therefrom the cash in the treasury and all taxes levied and uncollected.

"8th. That the warrants now called by the county treasurer are the debts contracted after said 9th day of March, 1893, and were issued between the 2nd day of April, 1893, and the 26th day of July, 1893, during all of which time said indebtedness of $85,441.92 was outstanding, and all of said warrants now called were and are in excess of the constitutional limit of indebtedness of said county and were issued without the assent of the voters of said county first had and obtained at an election held for that purpose, and they have not been validated by any vote of the electors of said county since their issue."

[1] Portions of opinion omitted. — ED.

Judgment was rendered against the defendant and a permanent injunction issued against the payment of the warrants designated in the complaint. The defendant appeals.

1. Respondent maintains here that the payment of the warrants is inhibited by § 6 of art. 8 of the constitution of this state, of which the part material for consideration is as follows: "No county, city, town, school district or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, etc., without the assent of three-fifths of the voters therein voting at an election for that purpose. . . . Provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district or other municipal purposes;" and with the further proviso that any city or town shall be allowed to become indebted to a larger amount, not exceeding five per centum additional for supplying such city or town with water, light and sewers, when the works for supplying the same shall be owned and controlled by the municipality.

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When the constitution of Washington was adopted by the people of the newly-born state, the various county governments in the territory were recognized and their organizations and powers in a great measure continued. A large body of laws applicable to the new state, and which the people had for a long time been accustomed to, were found and continued in force. At this time some of the counties in the state were already indebted to an amount equal to the constitutional limitation of one and one-half per centum. The state itself inherited from its territorial form liabilities which very nearly equalled the limitation on state indebtedness prescribed in § 1, art. 8 of the constitution. The several counties, in addition to their organization for local purposes, and having conferred upon them the power to control and build county roads and bridges, erect public buildings for county purposes, and do many other things connected with the county as a corporation, also had imposed upon them certain duties by the state, and became governmental agencies, in the territory comprised in the county, for the state. Section 11 of art. 11 authorizes any county, city, town or township to make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws. Section 12 of the same article provides:

"The legislature shall have no power to impose taxes upon counties . . . or upon the inhabitants or property thereof, for county . . . purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The duty has been imposed upon the several counties in this state to provide for and pay certain necessary expenses for the enforcement of the criminal laws of the state and for expenses incurred at

the regular biennial state elections at which county and state officers are elected, and in carrying out other functions of the state; and also to make expenditures necessary for the existence of the county organization.

Section 8, art. 6 of the constitution, provides for biennial elections. Section 5, art. 11, also provides for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county officers as public convenience may require, and devolves upon the legislature the power to prescribe their duties and fix their terms of office, and to regulate the compensation of all such officers in proportion to their duties, and that for that purpose the legislature may classify the counties by population.

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2. The objects of government have usually become multiplied with the development of complex and artificial conditions of society. There is much controversy at times among our statesmen as to the necessary and proper limitations upon the powers of government, both state and municipal, but all are agreed that certain necessary fundamental functions of government must always be expressed and exercised. The protection of life, liberty and property, the conservation of peace and good order in the state, cannot remain in abeyance. These functions of government are elementary and indestructible. The constitutional convention which framed, and the sovereign people who adopted, a republican form of government for the state of Washington, had these known principles in mind. Section 10 of the Declaration of Rights prescribes: "Justice in all cases shall be administered openly and without unnecessary delay;" and in § 22 it is declared: "In criminal prosecutions the accused shall have the right to . . . have compulsory process to compel the attendance of witnesses in his own behalf, have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. . . ." Provision is also made in the constitution for the organization and maintenance of the county government and, as we have seen, its administration is ancillary to that of the state. All these provisions of the organic law are alike declared to be mandatory. It would make these various provisions of the constitution contradictory and render some of them nugatory, if a construction were placed upon the limitation of county indebtedness which would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view. The judicial power was vested in the courts; the law must be administered through them; the jury is an essential part of the judicial procedure; justice must be administered without unnecessary delay between the citizens of the state; persons accused of crimes must have a speedy and impar-

tial jury trial; compulsory process must be served by the sheriff, witnesses are compelled to appear. The regulation of much of this procedure, and the compensation of jurors and witnesses, as well as of officers, in the counties, is vested in legislative discretion. Section 1 of art. 9 of the constitution declares: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders;" and § 2, same article: "the legislature shall provide for a general and uniform system of public schools." Our constitution seems to have added to the proper and essential functions of free government the maintenance of public schools.

3. The construction by some of the other courts of similar constitutional provisions may here be examined. In *Grant County v. Lake County*, 17 Ore. 453 (21 Pac. 447), the court, referring to the constitution of Oregon, said:

"The constitutional inhibition that no county shall create any debts or liabilities which shall, singly or in the aggregate, exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, does not imply that all debts and liabilities against a county over and above that sum are necessarily obnoxious to that provision. To justify the court in finding the said conclusion of law, it should have found that the county *created* the indebtedness. Counties do not create all the debts and liabilities which they are under; ordinarily such debts and liabilities are imposed upon them by law. A county is mainly a mere agency of the state government — a function through which the state administers its governmental affairs — and it has but little option in the creation of debts and liabilities against it. It must pay the salaries of its officers, the expenses incurred in holding courts within and for it, and various and many other expenses the law charges upon it, and which it is powerless to prevent. Debts and liabilities arising out of such matters, whatever sum they may amount to, cannot in reason be said to have been created in violation of the provision of the constitution referred to, as they are really created by the general laws of the state, in the administration of its governmental affairs. Said provision of the constitution, as I view it, only applies to debts and liabilities which a county, in its corporate character, and as an artificial person, voluntarily creates."

This decision has been followed by the same court in *Wormington v. Pierce*, 22 Ore. 606 (30 Pac. 450); *Burnett v. Markley*, 23 Ore. 436 (31 Pac. 1050), and *Dorothy v. Pierce*, 27 Ore. 373 (41 Pac. 668).

The supreme court of California, in *Lewis v. Widber*, 99 Cal. 412 (33 Pac. 1128), observes:

"The respondent contends . . . that he should not pay petitioner's salary on account of § 18 of art. XI of the state constitution, which reads as follows: 'No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in

any manner, or for any purpose, exceeding any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified voters,' etc. It is quite apparent, however, that this clause of the constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred, that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Such is the plain meaning of the language used. The clear intent expressed in the clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur. But the stated salary of a public officer fixed by statute is a matter over which the municipality has no control, and with respect to which it has no discretion; and the payment of his salary is a liability established by the legislature at the date of the creation of the office. It, therefore, is not an indebtedness or liability incurred by the municipality within the meaning of said clause of the constitution."

[After citing various authorities, some of which are in conflict with the foregoing cases.]

We are constrained to rule that the constitutional limitation of county indebtedness in § 6 of article 8 of our constitution, does not include those necessary expenditures made mandatory in the constitution and provided for by the legislature of the state, and imposed upon the county; that the payment of these is a prior obligation, and other liabilities incurred by the county are subject and inferior to these primary obligations which must of necessity always continue.

The cause is reversed and remanded to the superior court of Klickitat county, with instructions to proceed in conformity to the views expressed in this opinion.

Scott, C. J., and Anders, Dunbar and Gordon, JJ., concur.

BARNARD *v.* KNOX COUNTY.

1891. 105 *Missouri*, 382.[1]

Appeal from Knox Circuit Court.

H. M. Pollard, for appellant.

Charles D. Stewart and *William Clancy*, for respondent.

Black, J. This is a suit upon a duly protested warrant issued by the county court of Knox county, to George D. Barnard, dated the seventh day of May, 1885, for $83.90, payable "out of any money in the treasury appropriated for the contingent fund." Barnard assigned the warrant to the plaintiff corporation.

The defense is that the debt, for which the warrant was issued,

[1] Arguments omitted. — Ed.

was created after the county court had issued warrants in excess of the revenue for 1885. In anticipation of this defense, it is alleged in the petition that though the county court had issued warrants in excess of the total revenue for that year, still the plaintiff's debt was created by law, and not by the act of the county court, and that the county debts for that year created by law were less than the county revenue for the same year.

The case was tried on the following agreed facts: "That, on the seventh day of May, 1885, the clerk of the county court of Knox county, Missouri, bought from Geo. D. Barnard certain books and stationery for $83.90; that said books and stationery were suitable and necessary for the use of said clerk in his said official capacity; that thereupon said Barnard presented said bill, for said books and stationery, to the county court of said county, which said court audited and allowed said bill, and issued the warrant filed herein; . . . that there is no money in defendant's treasury now to pay the same; that, at the time of issuing said warrant, the said county court had issued warrants in excess of the total revenue of said county for the year 1885, raised by a levy of fifty cents on the hundred dollars, and from licenses and other sources; but excluding the warrants issued during the said year for support of paupers, and roads, and bridges, the remainder did not exceed such fifty cents on the hundred dollars; . . . that no vote of the people of the county, on the question of paying this warrant, or the creation of the debt evidenced thereby, has ever been had. The annual revenue of the county, to the extent of fifty cents on the one-hundred-dollar valuation, is now entirely consumed by the ordinary annual expenses of the county government."

The provisions of the constitution to be considered in the disposition of this case are found in sections 11 and 12, of article 10. The first provides: "For county purposes the annual rate on property, in counties having $6,000,000 or less, shall not in the aggregate exceed fifty cents on the one-hundred-dollar valuation." The same section fixes the maximum annual rate of taxes for city and town purposes, and for school purposes, and contains these exceptions: *First.* The annual rate for school purposes may be increased to a designated amount by a majority vote of the taxpayers. *Second.* The rate may be increased by a two-thirds vote for the purpose of erecting public buildings. The rate allowed to each county is to be ascertained by the amount of taxable property therein, according to the last assessment. "Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness."

Section 12 declares: "No county . . . shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without

In 188 Mo. 148 — held judgment for tortious injury is not a debt

the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein," etc.

The statute makes it the duty of the county court at its May term, in each year, to divide the revenue collected, and to be collected, into five designated and described funds, one of which is a contingent fund not to exceed one-fifth of the total revenue of the county for county purposes for any one year; and each fund is declared to be a sacred fund for the purpose for which it is designated. R. S. 1879, secs. 6818, 6819.

In 1875 and prior thereto, many of the counties and cities in this state were burdened with debts, because of bonds issued in aid of railroads, some of which were never built, and on account of extravagance, frauds and defalcations of officials. To put an end to this state of affairs, the constitution adopted in that year denied to any county or city the right to thereafter take stock in, or loan its credit to, any railroad company or other corporations; and, by the two sections before mentioned, sought to bring the administration of county affairs to a cash basis. As said in *Book v. Earl*, 87 Mo. 246, the evident purpose of the framers of the constitution and the people in adopting it was to abolish, in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and by limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury.

We do not understand counsel for the appellant to dispute these propositions; but the claim is made and pressed with much vigor, that section 12 does not include debts like that for which the warrant in question was given. The line of argument is this: As the statute makes it the duty of the county clerk to provide suitable books and stationery for his office (R. S. 1879, sec. 623), a debt created for such a purpose is not one incurred or created by the county court, but is a debt created by law, and that such debts are not within the prohibition. Authorities are cited which give support to such a distinction. *Grant Co. v. Lake Co.*, 17 Or. 453; *Barnard & Co. v. Knox Co.*, 37 Fed. Rep. 563, and *Rollins v. Lake Co.*, 34 Fed. Rep. 815. The case last cited, it may be observed, was reversed by the supreme court of the United States. 130 U. S. 662.

On the other hand the constitution of Colorado contains this provision: "And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above limited, unless," etc. The supreme court of that state said, when speaking of this clause: "The limitation being applicable to

all debts, irrespective of their form, it follows that in determining the amount of county indebtedness county warrants are to be taken into account and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void." *The People ex rel. v. May*, 9 Col. 80–98.

The circuit court of the United States in *Rollins v. Lake Co.*, *supra*, when having under consideration the clause of the Colorado constitution before quoted, held that warrants, issued for fees of witnesses, jurors, constables and sheriff, were not within the prohibition, because issued in payment of compulsory obligations; and, hence, it was no defense in an action upon such warrants that at the time they were issued the limit fixed by the constitution had been reached.

The supreme court of the United States when speaking upon this question in the same case said: "Neither can we assent to the proposition of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers, and authorized the legis'ature to fix their compensation and that of other officials, affect the question. . . . In short we conclude that article 6 aforesaid is a limitation upon the power of the county to contract any and all indebtedness including all such as that sued upon in this action; and, therefore, under the stipulation already set forth, the county is entitled to judgment." *Lake Co. v. Rollins*, 130 U. S. 662.

A clause in the constitution of Illinois declares that "no county, city, etc., shall be allowed to become indebted in any manner, or for any purpose," beyond a stated amount. Yet the decisions of the supreme court of that state recognize no such distinction as that sought to be made in the case at bar. The result of the decisions of that court is, that it can make no difference whether the debts be created for necessary current expenses or for something else. *Prince v. City of Quincy*, 105 Ill. 138; s. c., 105 Ill. 215.

The supreme court of Iowa when speaking of the same clause in the constitution of that state says: "The language of this provision is very general and comprehensive. It includes indebtedness incurred in any manner or for any purpose." *City of Council Bluffs v. Stewart*, 51 Iowa, 385. It is true the clauses in the constitutions of the states just named prohibit the incurring of indebtedness beyond a specified per cent. of the assessed value of the taxable property, while in our constitution the prohibition is against the incurring of an indebtedness in excess of the revenue of the partic-

ular year. But we do not see that this difference affects the question in hand. The object of all these provisions is to fix a limit to county and municipal indebtedness.

Our constitution, it will be seen, first limits the rate of taxation for county purposes to fifty cents on the one-hundred-dollar valuation in counties like the one in question. This rate may be increased by the assent of the qualified voters for the purpose of erecting public buildings, but it cannot be increased even by such assent for any other purpose.

We have held that a county court cannot levy a tax in excess of the fifty cents for any purpose, except for the purpose of erecting public buildings, and for the purpose of paying indebtedness existing at the date of the adoption of the constitution. *Arnold v. Hawkins*, 95 Mo. 569; *Black v. McGonigle*, 103 Mo. 192. The maximum limit of the rate of taxation for county purposes being thus fixed, section 12, to repeat, declares: "No county, city . . . shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year." As to counties the only exception is, that with the assent of the voters the expenditures may be increased for the erection of a courthouse or jail. The language just quoted is clear and explicit and construes itself; it is broad and comprehensive as to the character of the indebtedness. It includes indebtedness created *in any manner or for any purpose*.

This strong and comprehensive language admits of no distinction between debts created by a county court and debts created by law. In a sense all county debts are created by law; for the counties possess those powers and those only which are conferred upon them by the constitution and laws of the state. While it is the duty of the county court to care for paupers and insane persons and to build bridges and repair roads, still the county court is governed by the statute in the performance of these duties. Debts incurred for such purposes may be called debts created by law as well as debts incurred by the county clerk for books and stationery.

Nor does it make any difference that the debt in question was created by the clerk instead of the county court. The clerk in the purchase of the books and stationery acted as a county officer; the debt incurred by him, if he did not exceed his authority, is just as much a county debt as one incurred by the county court. The law confers upon various county officers the power to create debts for designated purposes, but the debts are all county debts when chargeable to the county. The county clerk, county court and other county officers must take notice of these constitutional limitations, and exercise the powers conferred upon them in subordination to such restrictions. To hold otherwise is to say the clerk and other officers may execute statutory powers in excess of constitutional restrictions, and thus make the statute laws override the constitution.

It is, of course, a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such surface view of the matter. The constitution seeks to protect the citizen and taxpayer, and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials themselves, to take notice of the limit prescribed by the constitution. 1 Dill. Munic. Corp. [4 Ed.] sec. 134*a*. Soliciting agents, contractors and others who deal with county officials must see to it that the limit of county indebtedness is not exceeded, and, if they fail to do this, they must suffer the consequences. Unless this is so there is an end to all effort to bring about an economical and honest administration of county affairs. If this scheme of county finances built up by the constitution is a mistake, or if it produces great hardships in some counties, the remedy is with the people and not with the courts. "What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require." Cooley on Const. Lim. [5 Ed.] 67.

The plaintiff insists that there is no substantial difference between this case and *Potter v. Douglas Co.*, 87 Mo. 240. In that case the plaintiff sued Douglas county for services performed by him as jailer of Greene county, in keeping, boarding, clothing and taking to court prisoners. The indebtedness was incurred under section 6090, Revised Statutes, 1879. The agreed statement showed "that, at the time the fee bill was presented to the county court, the revenue for said years was expended, and the same could not be paid without issuing warrants in excess of the income and revenue for said years." On this statement we held the plaintiff could recover. It is to be observed that the agreed statement in that case did not show that the revenues had been expended when the indebtedness was incurred. For aught that appears there may have been revenues unexpended and set apart to the proper fund when the indebtedness was contracted. Our opinion, however, is not placed on any such ground. It is placed upon grounds which would include the case in hand, and which are inconsistent with what has been said on the present occasion. There is, of course, a difference between the facts in that case and the facts in the present one, but the constitution takes no notice of such differences. That case is, therefore, overruled.

Now the agreed statement in this case does not, in terms, say that the contingent fund set apart for 1885 had been exhausted when the books and stationery were purchased; but it does show that the warrant was issued at the date of the purchase, and that at that time the county court had issued warrants in excess of the total revenue for that year. This statement must be taken in connection with the petition which is framed upon the theory that the whole of the revenue had been consumed, unless warrants issued for the support of paupers and for building bridges and repairing roads are to be excluded

We think it sufficiently appears that the contingent fund had been consumed when the debt sued for was incurred. Indeed, this proposition is not questioned in the briefs.

The warrant was issued in violation of the constitution, and is void. Judgment affirmed. BARCLAY, J., absent; the other judges concur.

DAVIS *v.* CITY OF DES MOINES.

1887. 71 *Iowa*, 500.

APPEAL from Polk Circuit Court.

The petition sets forth that the defendant is already indebted to the full constitutional limit; that the plaintiff is the owner of certain land fronting on one of the streets of the city, and that the city, by its officers, entered into a contract with one McCauley to construct a sewer in said street, and to pay him therefor by assessing the contract price thereof against the adjacent property; that the municipal authorities are about to make said assessment, and charge the same upon the lots, and proceed to collect the same of said owner. It is prayed that the said contract be cancelled and declared void, and the defendant be enjoined from in any manner attempting to enforce said contract. The defendant, by its answer, denies that it has contracted, or proposes to contract, an indebtedness for the construction of said sewer. There was a demurrer to the answer, which was overruled, and the plaintiff appeals.

Henry S. Wilcox, for appellant.

James H. Dietrick and *Hugh Brennan*, for appellee.

ROTHROCK, J. The question to be determined is, did the contract in question create an indebtedness against the city? A copy of said contract is exhibited with the answer. So far as the said contract purports to create an obligation against the city, it is as follows: "The said P. H. McCauley agrees and hereby undertakes to do and perform said work in accordance with the plans and specifications, at the following rate or price, to-wit: one dollar and seventy-four cents per lineal foot or square yard, which price shall cover the cost of the entire work. The said cost is, under the law and ordinances of said city, to be assessed against the private property adjacent to or fronting on the street upon which said improvement is made, and a part thereof, to-wit: in seven annual installments, as provided by the law and ordinances of the city, with six per cent interest. Said assessment is payable as follows: When such assessment is made, and any portion of the work completed and accepted by the city, certificates thereof shall be made out showing the amount levied against each piece of property, and the same shall be delivered to said P. H. McCauley, and the same shall be received by him in

full payment for said work or improvement for the payment of which a special assessment is required by the law and ordinances of said city, and delivered to said P. H. McCauley or order. Said P. H. McCauley agrees to accept said certificates in full payment for any and all work performed by him under his contract, and to collect the same by any of the methods provided by law, and at his own cost and expense; and it is expressly agreed, by and between the parties to this contract, that, upon the issuing of certificates to said P. H. McCauley for any and all work done under this contract, the same shall be received by him in full payment therefor, without recourse to the city of Des Moines, Iowa."

It is provided by section 3, article 11, of the constitution, that "no county or other political or municipal corporation shall be allowed to become indebted in any manner, for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax-lists previous to the incurring of said indebtedness."

It seems to us that the contract in question does not create an indebtedness against the city. There is no doubt that the city is authorized by law to make special assessments for improvements of this character upon property adjacent to the improvements. Such are the plain provisions of our statute. See chapter 162, Laws 1878, and section 16, *c.* 168, Laws 1886. The contract involved in this case expressly provides that the certificates issued by the city shall be accepted by the contractor in full payment for his work, without recourse on the city. The city can never be held liable to any action for the construction of the sewer. Its resources cannot be affected thereby. Its contract is fully and completely performed by ascertaining the amount properly chargeable to the adjacent property, and the issuance of assessment certificates to the contractor.

We think the demurrer to the answer was properly overruled.

Affirmed.[1]

ROBINSON, J., IN TUTTLE *v.* POLK.

1894. 92 *Iowa*, 433; pp. 437–8; pp. 441–2.

ROBINSON, J. . . . The authority under which the city acted in entering into the agreement is found in chapter 168 of the Acts of the Twenty-first General Assembly, enacted in 1886. The city of Des Moines is within the provisions of that act. It authorizes con-

[1] As to whether the city would be liable to the contractor if the city officers neglect to make the assessment (or if the city officers neglect to collect the assessment in cases where the duty of collection rests upon the city); see conflicting authorities cited in *German-American Savings Bank* v. *City of Spokane*, 1897, Supreme Court of Washington, 49 Pacific Reporter, 542.

tracts for paving and curbing streets and constructing sewers in cities to which it applies, and provides for the issuing of bonds in payment. The cost of the improvement is to be assessed upon the property fronting or abutting upon it, and placed on the tax list of the county, and is payable at the office of the county treasurer. All money received from the assessments is to be appropriated to the payment of the interest and principal of the bonds, or certificates, if any are issued under section 16 of the act. The section is as follows: "Section 16. If by reason of the prohibition contained in section 3, article 11 of the constitution of this state it shall at any time be unlawful for any such city to issue bonds as by this act provided, it shall be lawful for such city to provide by ordinance for the issuance of certificates to contractors, who under contract with the city shall have constructed any such improvement, in payment therefor, each of which certificates shall state the amount or amounts of one or more of the assessments made against an owner or owners and lot or lots on account and for payment of the cost of any such improvement, and shall transfer to the contractor, and his assigns, all of the right and interest of such city to, in and with respect to every such assessment, and shall authorize such contractor and his assigns to receive, sue for, and collect, or have collected, every such assessment, embraced in any such certificate, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act." The certificates in question were issued under the authority of that section and chapter 44 of the Acts of the Twenty-second General Assembly. The last named act is only designed to cure defects, and provide for the reassessment and relevy of special taxes in certain cases, and does not otherwise add to the power, if any, conferred upon the city by section 16, quoted, to create indebtedness. There is nothing in that section which makes the city in any manner liable for the payment of the certificates. It merely authorizes the transfer to the contractor or his assignee of all the right and interest of the city in the assessment, in payment of the improvements made. The plain legislative intent was to provide a means for paying for improvements contemplated by the act without the incurring of any liability on the part of the city, acting under the provisions of section 16.

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It is said that the provision of the constitution in question was intended to protect the taxpayer from the reckless and corrupt acts of public officers, that the municipal corporations and the citizens thereof are one and the same, and that debts contracted by the corporation are debts of the citizens and taxpayers. There is a sense in which that is true, but it is not recognized in the constitution. That does not limit the amount which may be levied, in the form of taxes and special assessments, upon the property within the state. It recognizes the county and other political and municipal corporations

as being distinct entities. Although none can incur an indebtedness in excess of five per centum of the value of the taxable property within its limits, yet the same territory, and, therefore, the same property, may be included within the limits of different corporations, as those of a county, city, or town, and school district, and be subject to taxation for the debt of each. Strictly speaking, such a debt is not a lien upon any taxable property, nor a claim against any taxpayer, until a levy or an assessment has been made. Some property may be within the corporate limits when a debt is created, and without them when the tax for its payment is assessed. So the property owner, whose influence helps to create the debt, may have no property taxable within the corporate limits when the debt becomes due. It seems clear that in such cases the debt of the corporation is not primarily the debt of the owners of property within its limits, and the case is not different, in a legal sense, when an assessment is made for the payment of the debt at the time it is created, although in that case each property owner who has property subject to assessment may be liable for a definite portion of the debt. In this case the city attempted to enter into a contract for paving, for which a fixed compensation was to be paid. The contract did not require any payment to be made by the city, excepting in certificates, but provided that the agreed price should be collected by means of assessments. The paving of the streets is one of the purposes for which the city exists, and for which it might have assumed liability, had its debt not reached the constitutional limit; but it guarded against the assuming of any liability, and placed the burden of the improvement upon the owners of property which fronted upon it. That right was given by a statute which was especially designed to authorize the making of such improvements without cost to the city, and we find nothing to prevent giving it full effect. We do not think there is any sufficient reason for holding that the city is in any respect liable for the amounts represented by the certificates, nor that the obligation of the taxpayer is the debt of the city. In *Davis v. City of Des Moines*, 71 Iowa, 500, 32 N. W. Rep. 470, it appeared that a contract for the construction of a sewer was entered into, similar to the one attempted to be made in this case, and under the same statute. It was held that an assessment certificate issued pursuant to the contract to pay for the improvement did not create an indebtedness against the city. We conclude that section 16 of the Act of the Twenty-first General Assembly in question is not unconstitutional, as attempting to provide for the creation of a debt in excess of the amount authorized by the constitution.

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CHAPTER VI.

RIGHTS OF BONA-FIDE HOLDERS OF NEGOTIABLE BONDS

MARSH *v.* FULTON COUNTY.

1870. 10 *Wallace* (*U. S.*), 676.[1]

Error to U. S. Circuit Court for Southern District of Illinois.

Suit on fifteen bonds, purporting to be the obligations of the County of Fulton to the Central Division of the Mississippi and Wabash R. R. Co., or bearer. The Mississippi and Wabash R. R. Co. was incorporated by the legislature of Illinois in February, 1853. At an election held in November, 1853, a majority of the voters of Fulton County voted that the county should subscribe $75,000 to the capital stock of the aforesaid company, payable in the bonds of the county; such bonds not to be issued until certain conditions were complied with. (The material portions of the Illinois statute authorizing county subscriptions are stated in the opinion of the court.)

In February, 1857, an act was passed by the legislature of Illinois amending the charter of the Mississippi and Wabash Company, by which the line of the railroad was divided into three divisions, designated the Western, the Central, and the Eastern divisions, and each division was placed under the management and control of a board of three commissioners, to be elected by the stockholders of the division, and to be invested with all the powers of the original board of directors of the company over the road in their division.

In April, 1857, the stockholders within the Central Division elected commissioners of the division, who thenceforth, until December, 1868, exercised all the powers conferred by this amendatory act.

On the books of the Central Division thus organized, the clerk of the County Court of Fulton County, acting as clerk of the board of supervisors of that county, made the subscription of $75,000 in the name of the county, and in September following issued to this division the fifteen bonds which are in suit in this cause.

[The bonds contain no recitals as to the statute under which they were issued, or as to the prior votes or proceedings of the county or its officers.]

There were various acts of the board of supervisors of Fulton County done after the issue of these bonds, which tended to show

[1] Statement abridged. — Ed.

that the board recognized them and considered the county bound for them.

Defendants pleaded the general issue, and judgment was rendered in their favor.

O. H. Browning and O. C. Skinner, for plaintiff in error, relied largely on the fact which they asserted, and which they relied on as not disproved, that the bonds were in the hands of innocent holders for value; and that whether regularly issued originally or not, they had been ratified by the county in so many different ways, so advisedly and so unequivocally, that irregularity could not now be set up.

S. Corning Judd, contra.

Mr. Justice FIELD delivered the opinion of the court.

The questions presented for our consideration are, *first*, whether the bonds issued by the clerk of the County Court of Fulton County to the Central Division of the Mississippi and Wabash Railroad Company were, at the time of their issue, valid obligations of the County of Fulton; and, *second*, if not thus valid, whether they have become obligatory upon the county by any subsequent ratification.

Were they valid when issued? The answer depends upon the law of Illinois then in force. The clerk of the County Court possessed no general authority to bind the county. He was a mere ministerial officer of the board of supervisors; and that body was equally destitute of authority in this particular, except as the law of Illinois gave it. That law authorized any county of the State, and, of course, its supervisors, who exercised the powers of the county, to subscribe stock to any railroad company in a sum not exceeding one hundred thousand dollars, and to pay for such subscription in its bonds, provided such subscription was previously sanctioned by a majority of the qualified voters of the county at an election called for the expression of their wishes on the subject, and it prohibited any subscription or the issue of any bonds for such subscription without such previous sanction. "No subscription shall be made or purchase bond issued by any county," says the law, "unless a majority of the qualified voters of such county . . . shall vote for the same." And the law further requires that the notices calling for the election "shall specify the company in which stock is proposed to be subscribed."

These provisions furnish the answer to the first question presented. The only subscription authorized by the voters of Fulton County was that to the Mississippi and Wabash Railroad Company, and one to the Petersburgh and Springfield Company. The Central Division of the Mississippi and Wabash Railroad Company was a different corporation from the original company. It has been so held by the Supreme Court of Illinois in a case involving the consideration of a portion of the bonds in suit and the remaining sixty thousand dollars of bonds of the original subscription.

The amendatory act of 1857 dividing the road into three divisions, and subjecting each division to the control and management of a different board, clothed with all the powers of the original board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire State, was voted by the electors of Fulton County; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value.

But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact we do not perceive how it could affect the liability of the County of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed — where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances*.[1] In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent

[1] 7 Wallace, 676.

to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition.[1]

We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way.

We perceive no error in the record, and the judgment of the Circuit Court must, therefore, be *Affirmed.*

TOWN OF COLOMA *v.* EAVES.

1875. 92 *U. S.* 484.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit brought by the plaintiff below to recover the amount due on the coupons attached to certain bonds, purporting to have been issued by the town of Coloma, through its proper officers, to the Chicago and Rock River Railroad Company, in payment of a subscription of $50,000 by the town to said company. The form of the bond is as follows: —

United States of America. [$1,000.

"County of Whiteside,

"*State of Illinois, Town of Coloma:* —

"Know all men by these presents, That the township of Coloma, in the county of Whiteside, and State of Illinois, acknowledges itself to owe and be indebted to the Chicago and Rock River Railroad

[1] McCracken *v.* City of San Francisco, 16 California, 624.

Company, or bearer, in the sum of $1,000, lawful money of the United States; which sum the said town of Coloma promises to pay to the Chicago and Rock River Railroad Company, or the bearer hereof, on the first day of July, 1881, at the office of the treasurer of the county of Whiteside aforesaid, in the State of Illinois, on the presentation of this bond, with interest thereon from the first day of January, 1872, at the rate of ten per centum per annum, payable annually at the office of the treasurer of the county of Whiteside aforesaid, on the presentation and surrender of the annexed coupons.

"[U. S. $5 revenue-stamp.]

"This bond is issued under and by virtue of a law of the State of Illinois entitled 'An Act to incorporate the Chicago and Rock River Railroad Company,' approved March 24, 1869, and in accordance with a vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law, and under a law of the State of Illinois entitled 'An Act to fund and provide for the paying of the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869; and, when this bond is registered in the State auditor's office of the State of Illinois, the principal and interest will be paid by the State treasurer, as provided by said last-mentioned law.

"In witness whereof, the supervisor and town-clerk of said town have hereunto set their hands and seals this first day of January, A.D. 1872.

"(Signed)	M. R. Adams, *Supervisor.*	[SEAL.]
"(Signed)	J. D. Davis, *Town-Clerk.*	[SEAL.]"

Recovery was resisted by the town, mainly upon the alleged ground of a want of power in the officers of the town to issue the bonds, because the legal voters of the town had not been notified to vote upon the question of the town's making the subscription in question.

On the trial of the case, judgment was rendered for the plaintiff for the amount of the coupons, and interest after they were due.

C. M. Osborn for plaintiff.

J. Grant, contra.

Mr. Justice Strong delivered the opinion of the court.

It appears by the record that the plaintiff is a *bona fide* holder and owner of the coupons upon which the suit is founded, having obtained them before they were due, and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of $50,000 to the capital stock of the Chicago and Rock River Railroad Company, for which the town received in return certificates of five hundred shares, of $100 each, in the stock of the company. That stock the town retains, but it resists the payment of the bonds, and of the coupons attached to them, alleging that they were issued without lawful authority.

Saying nothing at present of the dishonesty of such a defence while the consideration for which the bonds were given is retained, we come at once to the question, whether authority was shown for the stock subscription, and for the consequent issue of the bonds. At the outset, it is to be observed that the question is not between the town and its own agents: it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority.

By an act of the legislature of Illinois, the Chicago and Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls on Rock River to Chicago, a distance of about one hundred and thirty miles. The tenth section of the act enacted, that, "to aid in the construction of said road, any incorporated city, town, or township, organized under the township organization laws of the State, along or near the route of said road, might subscribe to the capital stock of said company." That the town of Coloma was one of the municipal divisions empowered by this section to subscribe fully appears, and also that the railroad was built into the town before the bonds were issued. But it is upon the eleventh section of the act that the defendant relies. That section is as follows: —

"No such subscription shall be made until the question has been submitted to the legal voters of said city, town, or township, in which the subscription is proposed to be made. And the clerk of such city, town, or township, is hereby required, upon presentation of a petition signed by at least ten citizens who are legal voters and tax-payers in such city, town, or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township; which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town, or township, voting at such election, have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town, or township, the amount so voted to be subscribed, and to receive from such company the proper certificates therefor. He shall also execute to said company, in the name of such city, town, or township, bonds bearing interest at ten per cent per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually; and which said bonds shall be signed by such president or supervisor or other executive officer, and

be attested by the clerk of the city, town, or township, in whose name the bonds are issued."

Sect. 12 provides, "It shall be the duty of the clerk of any such city, town, or township, in which a vote shall be given in favor of subscriptions, within ten days thereafter, to transmit to the county-clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid."

Most of these provisions are merely directory. But conceding, as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question, whether the town would subscribe, to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary inquiry must be, How is it to be ascertained whether the directions have been followed? whether there has been any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made, and before the bonds are issued? or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered, that, the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Every thing that tended to depress the market-value was adverse to the object the legislature had in view. It could not have been overlooked that their market-value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued, — contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view; namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided; and we think it may be avoided.

At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for

all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town-clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met. This presumption is strengthened by the provisions of the twelfth section, which make it the duty of the clerk to transmit to the county-clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election, and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority, and in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the town-clerk or executive officer of the municipality, — to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The eleventh section (quoted above) declared, that if it should appear that a majority of the legal voters of the city, town, or township, voting, had voted "for subscription," the executive officer and clerk should subscribe and execute bonds. "If it should appear," said the act. Appear when? Why, plainly, before the subscription was made and the bonds were executed; not afterwards. Appear to whom? In regard to this, there can be no doubt. Manifestly not to a court, after the bonds have been put on the market and sold, and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town-clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question; and there can be no doubt who was intended by the law to be the arbiter. In *Commissioners* v. *Nichols*, 14 Ohio St. 260, it was said that "a statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock-subscriptions, or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds when such provision had been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners; and, if delivered improvidently, the bonds will not be invalidated."

In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them; and they were registered in the office of the auditor of the State, in accordance with an act, requiring that, precedent to their registration, the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they "are issued under and by virtue of the act incorporating the railroad company," approved March 24, 1869, "and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law." After all this, it is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township-officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, — to those most competent to decide it, — and which the purchaser is, in general, in no condition to decide for himself.

This we understand to be the settled doctrine of this court. Indeed, some of our decisions have gone farther. In the leading case of *Knox* v. *Aspinwall*, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it.

This position was supported by reference to *The Royal British Bank v. Torquand*, 6 Ell. & Bl. 327, a case in the Exchequer Chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox* v. *Aspinwall* has been more than once reaffirmed in this court. It was in *Moran* v. *Miami County*, 2 Black, 732; in *Mercer County* v. *Hackett*, 1 Wall. 83; in *Supervisors* v. *Schenk*, 5 id. 784; and in *Mayor* v. *Muscatine*, 1 id. 384. It has never been overruled; and, whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox* v. *Aspinwall*. That, we think, has been so firmly seated in reason and authority, that it cannot be shaken. What it is has been well stated in sect. 419 of Dillon on Munic. Corp. After a review of the decisions of this court, the author remarks, "If, upon a true construction of the legislative enactment conferring the authority (viz., to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation." This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal. In *Bissell* v. *Jeffersonville*, 24 How. 287, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three-fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A

similar ruling was made in *Van Hostrop* v. *Madison City*, 1 Wall. 291, and in *Mercer County* v. *Hackett*, id. 83.

The same principle has recently been asserted in this court after very grave consideration, and it must be considered as settled. In *St. Joseph's Township* v. *Rogers*, 16 Wall. 644, it is stated thus: —

"Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were incorrect will not constitute a defence for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation condition, or qualification, which it is alleged was not fulfilled."

There is nothing in the case of *Marsh* v. *Fulton*, 10 Wall. 675, to which we have been referred, at all inconsistent with the rule thus asserted. In that case, there were no recitals in the bonds; and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open.

What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown; and, even if it had been admissible, the effort to assimilate the case to *Marsh* v. *Fulton* would fail. There the subscription was for the stock of a different corporation from that for which the people had voted: here it was not.

Judgment affirmed.

Mr. Justice Bradley delivered the following concurring opinion: —

I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County* v. *Aspinwall;* to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of tax-payers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute, the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no farther. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It

may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject; and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary; but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of *Lynde* v. *The County of Winnebago*, 16 Wall. 13. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court.

MR. JUSTICE MILLER, MR. JUSTICE DAVIS, and MR. JUSTICE FIELD, dissented.

MILLER, J., IN HUMBOLDT TOWNSHIP *v.* LONG.

1875. 92 *U. S.* 642, pp. 646–651.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE DAVIS and MR. JUSTICE FIELD, dissenting.

We have had argued and submitted to us, during the present term, some ten or twelve cases involving the validity of bonds issued in aid of railroads by counties and towns in different States.

They were reserved for decision until a late day in the term; and the opinions having been delivered in all of them within the last few weeks, I have waited for what I have thought proper to say by way of dissent to some of them until the last of these judgments are announced, as they have been to-day.

I understand these opinions to hold, that, when the constitution of the State, or an act of its legislature, imperatively forbids these municipalities to issue bonds in aid of railroads or other similar enterprises, all such bonds issued thereafter will be held void. But, if there exists any authority whatever to issue such bonds, no restrictions, limitations, or conditions imposed by the legislature in the exercise of that authority can be made effectual, if they be disregarded by the officers of those corporations.

That such is the necessary consequence of the decision just read, in the cases from the State of Kansas, is too obvious to need argument or illustration. That State had enacted a general law on the subject of subscriptions by counties and towns to aid in the construction of railroads, in which it was declared that no bonds should be issued on which the interest required an annual levy of a tax beyond one per cent of the value of the taxable property of the municipality which issued them.

In the cases under consideration this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness; but I do know that in some of the cases tried before me last summer in Kansas it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax-list of the year preceding the issue.

This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature.

It is therefore clear that, so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity.

It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the States on that subject.

The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a State constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. It establishes that of all the class of agencies, public or private, whether acting as officers whose powers are created by statute or by other corporations or by individuals, and whether the subject-matter relates to duties imposed by the nation, or the State, or by private corporations, or by individuals, on this one class of agents, and in regard to the exercise of this one class of powers alone, must full, absolute, and uncontrollable authority be conferred on them, or none. In reference to municipal bonds alone, the law is, that no authority to issue them can be given which is capable of any effectual condition or limitation as to its exercise.

The power of taxation, which has repeatedly been stated by this court to be the most necessary of all legislative powers, and least capable of restriction, may by positive enactments be limited. If the constitution of a State should declare that no tax shall be levied exceeding a certain per cent of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent, the courts would not hesitate to pronounce a levy in excess of that rate void.

But when the legislature undertakes to limit the power of creating a debt by these corporations, which will require a tax to pay it in excess of that rate of taxation, this court says there is no power to do this effectually. No such principle has ever been applied by this court, or by any other court, to a State, to the United States, to private corporations, or to individuals. I challenge the production of a case in which it has been so applied.

In the *Floyd Acceptance Cases*, 7 Wall. 666, in which the Secretary of War had accepted time-drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent.

The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers.

It is, that wherever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it.

This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the *Floyd Acceptance Cases* this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed it could not be aided by giving the paper that form. In *County Bond Cases* it seems to be otherwise.

In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In *County Bond Cases*, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid.

There is no reason, in the nature of the condition on which the power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in each case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that

town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township-clerk or the county-clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that, before buying these bonds, the purchaser must look to those matters on which their validity depended.

They are all public, all open, all accessible, — the statute, the ordinance for their issue, the latest assessment-roll. But in favor of a purchaser of municipal bonds all this is to be disregarded, and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district.

I say helpless advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent, acting contrary, perhaps, to his wishes.

Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties, and villages, in creating debts which not they, but the property-owners, must pay.

The original case on which this ruling is based is *Knox County* v. *Aspinwall*, 21 How. 539. It has, I admit, been frequently cited and followed in this court since then, but the reasoning on which it was founded has never been examined or defended until now: it has simply been followed. The case of the *Town of Coloma* v. *Eaves*, 92 U. S. 484, is the first attempt to defend it on principle that has ever been made. How far it has been successful I will not undertake to say. Of one thing I feel very sure, that if the English judges who decided the case of *The Royal British Bank* v. *Tarquand*, on the authority of which *Knox County* v. *Aspinwall* was based, were here to-day, they would be filled with astonishment at this result of their decision.

The bank in that case was not a corporation. It was a joint-stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended in this particular case on a resolution of the company. The charter or deed of settlement gave the power, and, when it was exercised, the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

That was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official records made and kept by officers of the law for that very purpose.

In all these material circumstances that case differed widely from those now before us.

It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due.

But it is another thing to say that when an officer created by the law exceeds the authority conferred upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue, and no power to prevent it.

This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market.

If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose, rather than the property-holder, who might not know any thing of the matter, or, if he did, had no power to prevent the wrong.

NORTHERN BANK OF TOLEDO *v.* PORTER TOWNSHIP TRUSTEES.

1884. 110 *U. S.* 608.[1]

Error to U. S. Circuit Court for Northern District of Ohio. Verdict below for defendants.

This was an action upon bonds purporting to be issued by Porter Township in payment of a subscription to the stock of the Springfield, Mount Vernon, and Pittsburgh R. R. Co. By the charter of said company, granted March 21st, 1850, power was given to the county commissioners to subscribe for stock if authorized by vote of the electors; and, if the county commissioners should not be authorized by such a vote, then the township trustees were empowered to subscribe if authorized by vote of the qualified voters of the township.

Up to March 25th, 1851, neither Delaware County, nor Porter Township in Delaware County, had subscribed, or voted to subscribe to the stock of the railroad company.

By an act passed March 25th, 1851, county commissioners of the several counties, through or into which the Springfield and Mansfield Railroad shall be located, were authorized to cause the question of subscription provided for in the act of March 21st, 1850, " to be submitted to the qualified voters of their respective counties, at a *special* election, to be by them called for that purpose, at any time

[1] Statement abridged. Portions of opinion omitted. — Ed.

thereafter, having first given twenty days' previous notice;" further, that "if the commissioners of any of the counties aforesaid shall *not* be authorized by the vote as aforesaid to subscribe to the capital stock of said company on behalf of their respective counties, *then, and in that case*, the question of subscription by township trustees provided for in the same act incorporating said railroad company shall be submitted to the people of the respective townships, at a *special* election, to be called as provided for in the first section of this act" — such elections to be conducted in all respects in the same manner provided for in the charter of the company, except as modified by the said act of March 25th, 1851.

. . . . . .

On the 15th day of April, 1851, the commissioners of Delaware County, Ohio, passed an order submitting to the voters of that county, at a special election to be held on the 17th day of June thereafter, a proposition to subscribe the sum of $50,000 to the capital stock of the Springfield and Mansfield Railroad Company, a corporation created under the laws of that State, and whose name was subsequently changed to that of the Springfield, Mount Vernon and Pittsburgh Railroad Company. This proposition was approved by the electors, and subsequently, August 4th, 1851, the county commissioners made a subscription of the amount voted, payable in bonds of the county.

. . . . . .

After the vote in favor of a county subscription of $50,000, and two days before the formal subscription in its behalf by the county commissioners, that is, on the 2d day of August, 1851, the trustees of Porter Township, in Delaware County, passed an order submitting to the voters of that township, at a special election to be held on the 30th day of August thereafter, a proposition for a subscription of not exceeding $10,000 and not less than $8,000 to the capital stock of the same company, payable in township bonds, upon the condition that the road should be permanently located and established through that township. The proposition was approved by the voters, and subsequently, on May 6th, 1853, township bonds for the amount voted with interest coupons attached were issued. They were made payable to the railroad company or its assignees, and were in the customary form of negotiable municipal bonds. Each one recited that it was "issued in part payment of a subscription of one hundred and sixty shares of $50 each to the capital stock of the said Springfield, Mount Vernon and Pittsburgh Railroad Company, made by the said township of Porter in pursuance of the provisions of the several acts of the general assembly of the State of Ohio and of a vote of the qualified electors of said township of Porter taken in pursuance thereof."

. . . . . .

In behalf of the plaintiff in error, the present holder of the bonds, it is claimed that there was statutory authority for their issue, and

that, apart from any question of such authority, the township is estopped by their recitals, and by numerous payments of annual interest, from disputing its liability.

E. W. Kittredge, for plaintiff in error.

W. M. Ramsey, for defendant in error.

HARLAN, J.

. . . . . .

The general assembly of Ohio, it must be presumed, knew at the passage of the act of March 25th, 1851, what particular counties and townships had then made subscriptions to the stock of this railroad company. That act was passed with reference to the situation as it actually was. When, therefore, upon the basis of non-authorization of the commissioners to make a county subscription, it was provided, in the act of March 25th, 1851, that "then, and in that case" townships might subscribe, it must have been intended that the authority of any township, which had not *then* acted, to subscribe should exist only where, after the passage of the latter act, a county subscription had been negatived either by a vote of the people or by the refusal or failure of the commissioners within a reasonable time to submit the question to a popular vote. If this be not so, then Porter Township would have been authorized in its discretion to vote on a proposition to subscribe either at the annual election in April, 1851, or at any special election thereafter held, notwithstanding the county may have previously made a subscription. But such we cannot suppose to be a correct interpretation of the statute. Consequently, from and after March 25th, 1851, it was apparent from the terms of the act of that date that Porter Township had no legal authority to make a subscription of stock, except in the contingency — which the township could not control, but of which it and all others were bound to take notice — that the commissioners had not been authorized to subscribe for the county. So far from that contingency ever arising, the commissioners (before the township election was called) had been authorized by popular vote to subscribe, and they did in fact subscribe, the sum of $50,000. It cannot, therefore, be said that the commissioners were not authorized by a vote of the county to subscribe at the time Porter Township voted; consequently, the latter was without legal authority to make a subscription. This conclusion is satisfactory to our minds, and is, besides, sustained by the decision of the Supreme Court of Ohio in *Hopple* v. *Trustees of Brown Township in Delaware County*, 13 Ohio St. 311, reaffirmed in *Hopple* v. *Hipple*, 33 Ohio St. 116.

It is, however, contended, that by the settled doctrines of this court, the township is estopped by the recitals of the bonds in suit, to make its present defence. The bonds, upon their face, purport to have been issued "in pursuance of the provisions of the several acts of the general assembly of the State of Ohio, and of a vote of the qualified electors in said township of Porter, taken in pursuance

thereof." These recitals, counsel argue, import a compliance, in all respects, with the law, and, therefore, the township will not be allowed, against a *bona fide* holder for value, to say that the circumstances did not exist which authorized it to issue the bonds. It is not to be denied that there are general expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it is presented. But this court said in *Cohens* v. *Virginia*, 6 Wheat. 264, and again in *Carroll* v. *Lessee of Carroll*, 16 How. 275, 287, that it was "a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." An examination of the cases, in which those general expressions are found, will show that the court has never intended to adjudge that mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation precluded an inquiry, even where the rights of a *bona fide* holder were involved, as to the existence of legislative authority to issue them.

A reference to a few of the adjudged cases will serve to illustrate the rule which has controlled the cases involving the validity of municipal bonds. In *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539, power was given to county commissioners to subscribe stock to be paid for by county bonds, in aid of a railroad corporation, the power to be exercised if the electors, at an election duly called, should approve the subscription. It was adjudged that as the power existed, and since the statute committed to the board of commissioners authority to decide whether the election was properly held, and whether the subscription was approved by a majority of the electors, the recital in bonds executed by those commissioners, that they were issued in pursuance of the statute giving the power, estopped the county from alleging or proving, to the prejudice of a *bona fide* holder, that requisite notices of the election had not been given. In *Bissell* v. *City of Jeffersonville*, 24 How. 287, the court found that there was power to issue the bonds, and that after they were issued and delivered to the railroad company it was too late, as against a *bona fide* holder, to call in question the determination of the facts, which the law prescribed as the basis of the exercise of the power granted, and which the city authorities were authorized and required to determine before bonds were issued.

Probably the fullest statement of the settled doctrine of this court is found in *Town of Coloma* v. *Eaves*, 92 U. S. 484. In that case the authority to make the subscription was made, by the statute, to depend upon the result of the submission of the question to a popular vote, and its approval by a majority of the legal votes cast. But whether the statute in these particulars was complied with, was

left to the decision of certain persons who held official relations with the municipality in whose behalf the proposed subscription was to be made. It was in reference to such a case that the court said: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." This doctrine was reaffirmed in *Buchanan* v. *Litchfield*, 102 U. S. 278, and in other cases, and we perceive no just ground to doubt its correctness, or to regard it as now open to question in this court.

But we are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. Such is not the case before us. Had the statutes of Ohio conferred upon a township in Delaware County authority to make a subscription to the stock of this company, upon the approval of the voters at an election previously held, then a recital, by its proper officers, such as is found in the bonds in suit, would have estopped the township from proving that no election was in fact held, or that the election was not called and conducted in the mode prescribed by law; for in such case it would be clear that the law had referred to the officers of the township, not only the ascertainment, but the decision of the facts involved in the mode of exercising the power granted. But in this case, as we have seen, power in townships to subscribe did not come into existence, that is, did not exist, except where the county commissioners had not been authorized to make a subscription. Whether they had not been so authorized, that is, whether the question of subscription had or not been submitted to a county vote, or whether the county commissioners had failed for so long a time to take the

sense of the people as to show that they had not, within the meaning of the law, been authorized to make a subscription, were matters with which the trustees of the township, in the discharge of their ordinary duties, had no official connection, and which the statute had not committed to their final determination. Granting that the recital in the bonds that they were issued "in pursuance of the provisions of the several acts of the general assembly of Ohio," is equivalent to an express recital that the county commissioners had not been authorized by a vote of the county to subscribe to the stock of this company, and that, consequently, the power conferred upon the township was brought into existence, still it is the recital of a fact arising out of the duties of county officers, and which the purchaser and all others must be presumed to know did not belong to the township to determine, so as to confer or create power which, under the law, did not exist. In the view we have taken of this case, *McClure* v. *Township of Oxford*, 94 U. S. 429, is instructive. That was a case of municipal subscription to a railroad corporation. The act conferring the authority provided that it should take effect (and, therefore, should not be a law except) from and after its publication in a particular newspaper. Thirty days' notice of the election was required. But the election was held within thirty days from the publication in the paper named in the act. The bonds recited that they were issued in pursuance of the statute, describing it by the date of its passage, not the date of its publication in the newspaper designated. They showed upon their face that the election was held April 8th, 1872. But the purchaser was held bound to know that the act was not in fact published in that newspaper until March 21st, 1872; that, therefore, it did not become a law until from and after that date. He was, consequently, charged with knowledge that the election was held upon insufficient notice. The bonds were, for these reasons, declared to be not binding upon any township. The publication of the act, plainly, was not a matter with which the township trustees, as such, had any official connection. It was not made their duty to have it published. The time of publication would not necessarily appear upon the township records; but publication in a named newspaper was, as the face of the act showed, vital, not simply to the exercise but to the very existence of the power to subscribe. We may repeat here what was said in *Anthony* v. *Jasper County*, 101 U. S. 693, 697, that purchasers of municipal bonds "are charged with notice of the laws of the State, granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created." So here, Porter Township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and conducted in the particular mode required by law. But it was not estopped to show

that it was without legislative authority to order the election of August 30th, 1851, and to issue the bonds in suit. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance.

The judgment is affirmed.

SUTLIFF *v.* LAKE COUNTY COMMISSIONERS.

1893. 147 *U. S.* 230.[1]

This was an action brought in the Circuit Court of the United States for the District of Colorado by a citizen of Connecticut against the county of Lake, a municipal corporation of Colorado, upon coupons for interest of six bonds for $500 each, part of a series of ten bonds, issued by the county on July 1, 1881, payable to bearer in twenty years, and redeemable at the pleasure of the county after ten years, and containing this recital:

"This bond is one of a series of five thousand dollars, which the board of county commissioners of said county have issued for the purpose of constructing roads and bridges, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the general assembly of the State of Colorado, entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

One defence was that the bonds were illegal and void, because they increased the indebtedness of the county to an amount in excess of the limit prescribed by certain provisions of the constitution and statutes of Colorado, the substance of which is stated in the opinion.

The Circuit Court gave judgment for the defendant; and the plaintiff took the case by writ of error to the Circuit Court of Appeals for the Eighth Circuit, before which the following facts were made to appear: At and before the issue and sale of said bonds, the county was in fact indebted to an amount greater than that permitted by the limitation contained in the constitution and statute of Colorado,

[1] Statement abridged. — Ed.

above cited; and therefore, as a matter of fact, the issue of said series of bonds, and the issue of each one thereof created an indebtedness on the part of the county in excess of the constitutional and statutory limitation applicable to said county at the date of the issue of said bonds. The plaintiff bought six of said series of bonds, paying full value therefor, relying upon the recitals in the bonds contained, and without making any examination into the facts that might appear upon the records of the county, and without any actual knowledge of the facts other than such knowledge with which he might be held chargeable from the statements in the bonds and the constitution and statutes of Colorado.

Upon the case as above stated, the Circuit Court of Appeals certified to this court the following questions and propositions of law:

"1. In view of the provisions of the act of the legislature of Colorado, approved March 24, 1877, providing for the making of a public record of the indebtedness and financial condition of the several counties in said State, was the said John Sutliff, plaintiff herein, when about to purchase the bonds sued on and issued under the provisions of said act of March 24, 1877, charged with the duty of examining the record of indebtedness provided for in said act, in order to ascertain whether the bonds he proposed to purchase were lawfully issued or whether the issuance thereof did not increase the indebtedness of the county beyond the constitutional limit?

"2. Do the recitals found in said bonds estop the county of Lake, as against a purchaser thereof for value before maturity, from proving as a defence thereto that when said series of bonds were issued the indebtedness of the county already equalled or exceeded the amount of indebtedness which the county could legally incur under the provisions of the constitutional limitation already cited?"

John McClure for plaintiff in error.

H. B. Johnson for defendants in error.

GRAY, J. The constitution, as well as the statute, of Colorado absolutely forbade a county to issue bonds, under any circumstances, to such an amount as would make the aggregate amount of the indebtedness of the county more than six dollars on each thousand of the assessed valuation if the taxable property in the county was more than five millions of dollars, or twelve dollars if such valuation was less than five and more than one million; and limited the right to issue bonds, without a previous vote of the qualified electors of the county, to half of such rates.

The statute, moreover, required the county commissioners, in submitting the question to a vote of the electors, to enter of record an order specifying the amount required and the object of the debt; and also made it their duty to publish, and to cause to be entered on their records, open to the inspection of the public at all times, semi-annual statements, exhibiting in detail the debts, expenditures and receipts of the county for the preceding six months, and striking the

balance so as to show the amount of any deficit and the balance in the treasury.

It is stated in the certificate upon which this case comes before us that at the time of the issue of the bonds in question the defendant county was in fact indebted beyond the constitutional and statutory limit, and the issue of each bond therefore created a debt in excess of that limit; and that the plaintiff bought the bonds, upon the faith of the recitals therein, and without making any examination into the facts appearing on the records of the county.

Upon these facts, in the light of the previous decisions of this court, it is clear that the plaintiff, although a purchaser for value and before maturity of the bonds, was charged with the duty of examining the record of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the constitution.

In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the State, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. *Marcy* v. *Oswego*, 92 U. S. 637; *Humboldt* v. *Long*, 92 U. S. 642; *Dixon County* v. *Field*, 111 U. S. 83; *Lake County* v. *Graham*, 130 U. S. 674, 682; *Chaffee County* v. *Potter*, 142 U. S. 355, 363.

But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

Accordingly, in *Dixon County* v. *Field*, above cited, which arose under an article of the constitution of Nebraska, limiting the power of a county to issue bonds to ten per cent of the assessed valuation of the county, it was adjudged that a county issuing bonds, each reciting that it was one of a series of $87,000 issued under and by virtue of this article of the constitution and the statutes of Nebraska upon the subject, was not estopped to show by the assessed valuation on the books of public record of the county that the bonds were in excess of the constitutional limit; and Mr. Justice Matthews, delivering the unanimous judgment of the court, fully stated the grounds of the decision, which sufficiently appear by the following extracts:

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite

record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to the proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument." 111 U. S. 93.

"In the present case there was no power at all conferred to issue bonds in excess of an amount equal to ten per cent upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors: the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." 111 U. S. 95.

That decision and the grounds upon which it rests were approved and affirmed in *Lake County* v. *Graham* and *Chaffee County* v. *Potter*, above cited, each of which arose under the article of the constitution of Colorado now in question, but under a different statute, which did not require the amount of indebtedness of the county to be stated on its records. In *Lake County* v. *Graham*, each bond showed on its face the whole amount of bonds issued, and the recorded valuation of property showed that amount to be in excess of the constitutional limit; and for this reason, as well as because the bonds contained no recital upon that point, the county was held not to be estopped to plead that limit. 130 U. S. 682, 683. In *Chaffee*

County v. *Potter*, on the other hand, the bonds contained an express recital that the total amount of the issue did not exceed the constitutional limit, and did not show on their face the amount of the issue, and the county records showed only the valuation of property, so that, as observed by Mr. Justice Lamar in delivering judgment: "The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises." 142 U. S. 363.

The case at bar does not fall within *Chaffee County* v. *Potter*, and cannot be distinguished in principle from *Dixon County* v. *Field* or from *Lake County* v. *Graham*. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be so shown, the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds.

It follows that the first question certified must be answered in the affirmative, and the second in the negative. Ordered accordingly.

CHAPTER VII.

LIABILITY TO ACCOUNT FOR PROPERTY RECEIVED UPON CONTRACTS NOT AUTHORIZED BY LAW.

CITY OF LOUISIANA *v.* WOOD.

1880. 102 *U. S.* 294.[1]

Error to U. S. Circuit Court for Eastern District of Missouri.

Action by Wood to recover back from the city money paid for certain bonds. The city had authority in law to borrow money, and to provide for the payment of its debts. An ordinance was passed, authorizing the city fund commissioner to negotiate bonds of the city for the purpose of raising money to liquidate the city debt, at a rate of discount not exceeding fifteen per cent. Before any bonds had been issued under this ordinance, the legislature, on March 28, 1872, passed a statute which provides that before any bond hereafter issued by any city, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the State Auditor, who shall register the same, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case.

On the 16th of July, 1872, after this act went into effect, the city, for the purpose of raising money to pay its interest-bearing debts and the expenses of its government, caused to be executed by its proper officers, and sealed with its corporate seal, twenty-one bonds, payable to bearer on the 1st of January, 1887, for $1,000 each, with coupons attached for semi-annual interest at the rate of ten per cent per annum. These bonds contained recitals that they were issued under the authority of the charter and the ordinance of Jan. 8, 1867. Although not actually executed until July 16, 1872, the city, "for the purpose of evading the provisions of said registration law, and with the intent to make it falsely appear that said bonds were not subject to the requirements of said law, caused said bonds to be antedated as of the first day of January, 1872, and caused it to be falsely stated in them that they were signed, countersigned, and sealed on the day last named." The bonds thus executed were, without being registered, placed by the fund commissioner in the hands of a respectable stock and bond broker in St. Louis, to sell for the account of the city. On the 25th of August, 1873, the broker and

[1] Statement abridged. — Ed.

agent sold and delivered to the plaintiff below, now the defendant in error, ten of the bonds at ninety per cent of their face value, and on the 1st of September nine more at the same rate. On the 24th of June he sold to Lewis Dorsheimer one bond, and on the 24th of February, 1874, another to John F. Gibbons, at the same price. The price was in each case paid to the broker in money, the purchasers all the time being ignorant of the fact that the bonds were actually executed after the registration law went into effect, or that the recitals were not in all respects true. They bought the bonds, and paid for them in good faith, believing them to be what on their face they purported to be, and obligatory on the city. The broker, with the assent of the fund commissioner, retained from the money realized on the sales five per cent on the par value of the bonds sold, for his services, and paid the residue to the commissioner, who, with the sanction of the city council, used part in the payment and redemption of matured bonds, coupons, and warrants of the city, and handed over the rest to the city treasurer. The fund commissioner reported the sales of the bonds to the city council, and charged himself with a sum equal to eighty-five per cent of the par value as the sum realized by him, making no mention of the amount retained by the broker for services. His accounts were examined and approved by the city council, and the bonds, coupons, and warrants taken up by his payments were destroyed. The interest on the bonds thus sold was met in full by the city as it matured until Jan. 1, 1876, when only forty per cent was paid, and on the 1st of July of that year the city declared its purpose not to pay either principal or interest, claiming that the bonds were invalid because not registered.

The bonds bought by Dorsheimer and Gibbons were transferred to the plaintiff. After the city had repudiated its obligation, he offered to return the whole twenty-one bonds, and demanded the repayment of the several sums paid for them. This being refused, the present suit was brought to recover back the money so paid. Upon the foregoing facts the court gave judgment against the city for $18,900, and interest at the rate of six per cent per annum from the time the payment of the interest on the bonds was stopped. To reverse that judgment, the city brought the case to this court, and the error assigned is that the facts found are not sufficient to support the judgment.

David P. Dyer for the plaintiff in error.

John D. S. Dryden, *contra*.

Mr. Chief Justice Waite, after stating the facts, delivered the opinion of the court.

That the bonds in question are invalid, is conceded. Such is the effect of *Anthony* v. *County of Jasper* (101 U. S. 693), decided at the last term. It is equally true that the legal effect of the transactions by which the plaintiff and his assignors got possession of the bonds was a borrowing by the city of the money paid for what was sup-

posed to be a purchase of the bonds. As the broker through whom the business was done was the agent of the city and acting as such, the case, so far as the city is concerned, is the same as though the money had been paid directly into the city treasury and the bonds given back in exchange. The fact that the purchasers did not know for whom the broker was acting is, for all the purposes of the present inquiry, immaterial. They believed they were buying valid bonds which had been negotiated and were on the market, when in reality they were loaning money to the city, and got no bonds. The city was in the market as a borrower, and received the money in that character, notwithstanding the transaction assumed the form of a sale of its securities.

The city, by putting the bonds out with a false date, represented that they were valid without registry. The bonds were bought and the price was paid under the belief, brought about by the conduct of the city, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. The objection goes only to the way it was done. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. They bought the bonds in open market, where they had been put by the city in the possession of one clothed with apparent authority to sell. The only party that has done any wrong is the city.

In *Moses* v. *MacFerlan* (2 Burr. 1005), it is stated as a rule of the common law, that an action "lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition." The present action can be sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the city. And the money was got through imposition, because the city, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh* v. *Fulton County* (10 Wall. 676), "the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

It is argued, however, that, as the city was only authorized by law to borrow money at a rate of interest not exceeding ten per cent per annum, the money cannot be recovered back, because a sale of the bonds involved an obligation to pay interest beyond the limited

rate, and the borrowing was, therefore, *ultra vires*. There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other.

Again, it was contended that, as the money in this case was borrowed to take up bonded indebtedness, the transaction was *ultra vires*, because the effect of the eleventh section of the act of 1872 was to repeal all earlier laws authorizing the borrowing of money for such purposes. We do not so understand that section. The old power to borrow, which the charter gave, was left unimpaired, but, under this new provision, registered bonds might be issued in place of old ones, if the city and the holders of the old bonds could agree on terms and the people gave their assent. In this way the holders of old bonds might avail themselves of the special tax which the law of 1872 required should be levied to meet the obligation of all registered bonds; but the city was not prevented from borrowing money to pay old bonds if it saw fit to do so, or if it could not agree on the terms of exchange.

The judgment below was right, and it is consequently

Affirmed.

RAILROAD NATIONAL BANK *v.* CITY OF LOWELL.

1872. 109 *Mass.* 214.

Contract to recover $3397 as money had and received to the plaintiffs' use. The case was submitted to the judgment of this court on the following statement of facts:

In 1864 Thomas G. Gerrish was chosen treasurer of the defendants, held the office by successive annual elections, and discharged the duties thereof until after March 10, 1869. During all this time he, as treasurer, had an account with the plaintiffs and with no other bank, under an arrangement between the parties that the accounts of the defendants should be kept there. In each of the years 1865, 1866, 1867 and 1868, the city council authorized him to borrow money of the plaintiffs in anticipation of the collection of taxes, and the sums so borrowed were always repaid with interest. In March 1869, Gerrish was a defaulter to the defendants as treasurer, to the amount of $30,000, but the fact was unknown to the parties to this action, and on the evening of March 9 a resolution, authorizing him to bor

row $130,000 from the plaintiffs, in anticipation of the collection of taxes for that year, was introduced into the common council, read once, and ordered to a second reading.

On the morning of March 10, 1869, at which time the amount standing to the credit of Gerrish as treasurer, in the plaintiffs' hands, was $2674, he stated to the plaintiffs' cashier that the necessary authority to borrow money had been granted the evening before, that the papers were not executed, and that he wished to overdraw his account. He therefore, without the knowledge of the defendants, or any especial authority from them, presented to the plaintiffs a check signed by himself as city treasurer, payable to his own order, and indorsed by him, for $5000, received the money therefor from the plaintiffs, placed the same in the cash-drawer where he kept the defendants' money, with "a small sum, exceeding $100," remaining there after the business of the preceding day; and from the money there he paid during the same day, to various creditors of the defendants, upwards of $4900. The rest of it was left there, and came into the possession of the defendants. He afterwards on the same day drew another check upon the plaintiffs, signed by himself as city treasurer, payable to bearer, for $1072, to pay a debt due from the defendants to a gaslight company, which check was presented to the plaintiffs by the company and paid on the same day.

On March 11, 1869, Gerrish resigned his office. He never kept a private account with the plaintiffs. Demand was made on the defendants on March 12, 1869.

C. Allen & F. W. Kittredge, for the plaintiffs.

T. H. Sweetser & J. F. McEvoy, for the defendants.

WELLS, J. That the city is not liable for the money as a loan, because it was advanced to its treasurer or paid upon his checks, is fully settled by the decisions in *Lowell Five Cents Savings Bank* v. *Winchester*, 8 Allen, 109; *Benoit* v. *Conway*, 10 Allen, 528; and *Dickinson* v. *Conway*, 12 Allen, 487.

It was also decided in *Kelley* v. *Lindsey*, 7 Gray, 287, that money advanced on account of the defendant to one in his employ, but who had no authority to borrow money for him, created no debt against the defendant, although advanced for the purpose of being expended in his business and to pay his debts, and actually so applied. That decision appears to us to be conclusive against the plaintiff in this case.

In *Dill* v. *Wareham*, 7 Met. 438, cited by the plaintiff, the money was paid into the treasury of the town in pursuance of a contract made by authority of a vote of the town.

In *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532, and *Skinner* v. *Merchants' Bank*, 4 Allen, 290, the money came into the actual possession and control of the defendant bank. The legal possession of money received by the officers of a bank, in the usual mode, is in the corporation, and not in the officers in whose charge and manual control it is intrusted. *Commonwealth* v. *Tuckerman*, 10 Gray, 173.

The treasurer of a city or town is an independent accounting officer, by statute made the depositary of the moneys of the city or town. Gen. Sts. *c.* 18, §§ 54, 59; *c.* 19, § 2. The legal possession of the specific moneys in his hands, from whatever source, is in him. *Hancock* v. *Hazzard*, 12 Cush. 112. *Coleraine* v. *Bell*, 9 Met. 499. All moneys of the city or town he holds as its property, and exclusively for its use. But he holds them by virtue of his public official authority and duty, and not merely as the agent or servant of a corporation.

The fact that the money in this case went into the hands of the treasurer, and was placed in the drawer provided by the city for his use in keeping the funds of the city, is not enough to charge the defendant with liability.

The result is, therefore, that the defendant is entitled to judgment.

COLT, J., IN AGAWAM NATIONAL BANK *v.* INHABITANTS OF SOUTH HADLEY.

1880. 128 *Mass.* 503, pp. 508, 509.

COLT, J. . . . It is said that an action for money had and received may be maintained against a municipal corporation, when the money has been received under such circumstances that, independently of express contract, the obligation of repayment is imposed as a matter of right and justice. Thus, when it is received under a contract made without authority or in violation of law, the duty arises to refund the money to the party from whom it was received, if, without affirming the illegal contract, the latter seeks only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. *Morville* v. *American Tract Society*, 123 Mass. 129. *Dill* v. *Wareham*, 7 Met. 438. *White* v. *Franklin Bank*, 22 Pick. 181. See also *Thomas* v. *Richmond*, 12 Wall. 349, 355. But in such cases it must appear that the money was actually and beneficially appropriated by the town or city in its corporate capacity. It cannot be treated as appropriated merely because it has been applied by the unauthorized act of the town treasurer, or of any other person, to the payment of municipal debts, for the payment of which other provision had been made. It is sometimes said, indeed, with reference to money borrowed in disregard of positive prohibition, when both parties are in fault, that it cannot under any circumstances be recovered back, because that would be to defeat the prohibition in favor of a guilty party. *McDonald* v. *Mayor, &c. of New York*, 68 N. Y. 23. *Parr* v. *Greenbush*, 72 N. Y. 463, 472. *Herzo* v. *San Francisco*, 33 Cal. 134. *Argenti* v. *San Francisco*, 16 Cal. 255, 282. See also Dillon Mun. Corp. § 383.

FIELD, J., IN CRAFT *v.* SOUTH BOSTON R. R.

1889. 150 *Mass.* 207, p. 210.

FIELD, J. . . . Whether a person under any circumstances can be made a debtor for money borrowed by another for him, without authority, and appropriated to his use without his knowledge or consent, need not be considered. See *Kelley* v. *Lindsey,* 7 Gray, 287. No obligation on the part of the defendant ought to be implied in this case, because Reed was a defaulter, and the money was used to cover up his defalcation by paying debts of the company, which the money of the company, if he had not embezzled it, would have been used to pay. The only reasonable inference is that Reed's primary purpose in using the money in this way was to escape detection and to benefit himself. Whether it was a benefit to the company that he was able to obtain and use money for this purpose is necessarily uncertain. The money was not borrowed *bona fide* for the use of the company. See *Railroad National Bank* v. *Lowell*, 109 Mass. 214; *Agawam National Bank* v. *South Hadley*, 128 Mass. 503.

MCDONALD *v.* MAYOR, &C., OF NEW YORK.

1876. 68 *New York,* 23.[1]

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff entered upon a verdict, and granting a new trial.

This action was brought to recover the value of certain gravel and stone alleged to have been sold and delivered by plaintiff to defendant and used in the repair of one of its streets.

The material was, as the evidence tended to show, furnished by plaintiff in 1869 and 1870, at the request of the superintendent of roads, to whom the bills were given and were certified by him to the street department. The material was taken and used on the streets. Further facts appear in the opinion.

Henry Parsons, for appellant.

D. J. Dean, for respondent.

FOLGER, J. The plaintiff sues to recover from the city the value of materials furnished by him to certain officials, which were used in the repair of a public way. The amount he claims is over $1,600 in the whole. The materials were furnished at different times, in parcels, each of which, except one, was less in value than $250.

He does not aver, nor did he prove in terms, that a necessity for

[1] Arguments omitted. — ED.

the purchase or use of the materials was certified to by the head of the department of public works, or that the expenditure therefor was authorized by the common council (Laws of 1857, vol. 1, p. 886, chap. 446, § 38); nor did he aver or prove in terms, that a contract for the purchase of the materials was entered into by the appropriate head of department, upon sealed bids or proposals, made in compliance with public notice advertised. (Id.)[1]

The existence and stringency of these statutory provisions are recognized by plaintiff's counsel, but the force of them is sought to be avoided. It is urged, that the object of the expenditure was proper, as it is part of the defendant's corporate duty to keep public ways in repair; that the material was delivered to the superintendent of roads, an official of the defendant, charged with carrying that duty into practical effect; and that the plaintiff had reason to believe that the superintendent was acting within the line of his duties. The first two of these propositions may be admitted; the third may not be. Doubtless, to the apprehension of the plaintiff, the superintendent was so acting, as to do work which it was the duty of the defendant to cause to be done. But we see nothing in the case which brought to his mind, so as to create a belief, that there had been a contract made for the material, as above indicated, or that the necessity for the expenditure had been certified to and authorized, as required by law. And though the superintendent of roads had certified to be correct, the bills for the materials, rendered by the plaintiff, this did not meet the letter of the statute laws. Such certification did not precede the reception of the material; nor was the certification by the head of the department; nor was the taking and use of the material, nor payment for it, authorized by the common council. Nor can it be that the provisions of the statute, are alone for the instruction of the department and officials of the defendant. They were a restraint upon them, but upon other persons as well. They put upon all who would deal with the city, the need of first looking for the authority

[1] "All contracts to be made or let by authority of the common council for work to be done or supplies to be furnished . . . shall be made by the appropriate heads of departments, under such regulations as shall be established by ordinances of the common council. Whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the corporation, and the several parts of the said work or supply shall together involve the expenditure of more than two hundred and fifty dollars, the same shall be by contract, under such regulations concerning it as shall be established by ordinance of the common council, unless by a vote of three-fourths of the members elected to each board, it shall be ordered otherwise; and all contracts shall be entered into by the appropriate heads of departments, and shall be founded on sealed bids or proposals made in compliance with public notice . . .; and all such contracts when given shall be given to the lowest bidder. . . . . No expenditure for work or supplies involving an amount for which no contract is required, shall be made, except the necessity therefor be certified to by the head of the appropriate department, and the expenditure be as authorized by the common council." *New York Laws of* 1857, Chap. 446, Sect. 38. — ED.

of the agent with whom they bargain. Quite clearly do they impose upon the paying agent of the defendant a prohibition against an unauthorized expenditure. And are they not also a restraint upon the municipality itself? They are fitted to insure official care and deliberation, and to hold the agents of the public to personal responsibility for expenditure; and they are a limit upon the powers of the corporation, inasmuch as they prescribe an exact mode for the exercise of the power of expenditure.

It is said that the plaintiff had a right to presume, that the agents of the defendant transacted their business properly, and under sufficient authority. Does not this involve, also, that the plaintiff had a right to presume, that it was the business of the superintendent of roads to purchase material for the city upon the credit of the city, and that he had authority so to do? This cannot be maintained. It is fundamental, that those seeking to deal with a municipal corporation through its officials, must take great care to learn the nature and extent of their power and authority. (*Hodges* v. *Buffalo*, 2 Denio, 110; cited 33 N. Y., 293; *Cornell* v. *Guilford*, 1 Den., 510; *Savings Bank* v. *Winchester*, 8 Allen, 109.) The plaintiff cites *United States Bank* v. *Dandridge* (12 Wheat., 70). But there it is said that if the charter imposes restrictions they must be obeyed. Could the plaintiff presume that it was the duty of the defendant to keep the Kingsbridge road in repair? No; he must look to its charter to learn of that duty. The same instrument would show him just how it must obtain the material to perform that duty. *The Gas Company* v. *San Francisco* (9 Cal., 453) is also cited. The real question there decided was, that a city can be held to have incurred a liability otherwise than by ordinance. There was no stress in that case upon any inhibitions in the charter of the city. The result was arrived at by a divided court.

But the main reliance of the plaintiff, is upon the proposition that the defendant, having appropriated the materials of the plaintiff and used them, is bound to deal justly and to pay him the value of them. The case of *Nelson* v. *The Mayor* (63 N. Y., 535) is cited. The learned judge who delivered the opinion in that case does, indeed, use language which approaches the plaintiff's proposition; but the judgment in that case did not go upon the doctrine there put forth; and when the opinion is scrutinized it does not quite cover this case. It is said: "If it (the city), obtains property under a void contract, and actually uses the property, and *collects the value of it from property owners by means of assessments*, the plainest principles of justice require that it should make compensation, for the value of such property, to the person from whom it was obtained." The words we have marked in italics indicate a difference between the two propositions; though it is to be admitted, not a great difference in the principles upon which each rests. The case in the California courts (*Argenti* v. *San Francisco*, 16 Cal., 255), goes upon the ground

set forth in the opinion in *Nelson's Case*, (*supra*). There is, however, a more radical difference, than that above noted, in the two cases cited and that in hand. In those two cases the way was open for implying a promise to pay what the property was worth, if with no disregard of statute law, such an implication was admissible; that is to say, there was in those cases, so far as appears from the facts, no express inhibition upon the city that it should not incur a liability save by an express contract. Here there is an express legislative inhibition upon the city, that it may not incur liability unless by writing and by record. How can it be said that a municipality is liable upon an implied promise, when the very statute which continues its corporate life, and gives it its powers, and prescribes the mode of the exercise of them, says, that it shall not, and hence cannot, become liable, save by express promise? Can a promise be implied, which the statute of frauds says must be in writing to be valid? How do the cases differ? *The Bank of the United States* v. *Dandridge* (*supra*), which is a leading case upon the doctrine of the liability of a corporation aggregate, upon a promise implied, holds, as we have already said, that if the charter imposes restrictions upon the manner of contracting, they must be observed. And the California cases above cited, concede the same. It is plain, that if the restriction put upon municipalities by the legislature, for the purposes of reducing and limiting the incurring of debt and the expenditure of the public money, may be removed, upon the doctrine now contended for, there is no legislative remedy for the evils of municipal government, which of late have excited so much attention and painful foreboding. Restrictions and inhibition by statute are practically of no avail, if they can be brought to naught by the unauthorized action of every official of lowest degree, acquiesced in, or not repudiated, by his superiors. *Donovan* v. *The Mayor, etc.* (33 N. Y., 291), seems to be an authority in point, though the exact question now presented was not considered. And incidental remarks of DENIO, J., in *Peterson* v. *The Mayor* (17 N. Y., 449), are to the same purport. And see *Peck* v. *Burr* (10 N. Y., 294). The views here set forth, are not to be extended beyond the facts of the case. It may be, that where a municipality has come into the possession of the money or the property of a person, without his voluntary intentional action concurring therein, the law will fix a liability and imply a promise to repay or return it. Thus, money paid by mistake, money collected for an illegal tax or assessment; property taken and used by an official, as that of the city, when not so; — in such cases, it may be that the statute will not act as an inhibition. The statute may not be carried further than its intention, certainly not further than its letter. Its purpose is to forbid and prevent the making of contracts by unauthorized official agents, for supplies for the use of the corporation. This opinion goes no further than to hold, that where a person makes a contract with the city of New York for supplies to it, without the requirements

of the charter being observed, he may not recover the value thereof upon an implied liability.

The judgment should be affirmed.

All concur. *Judgment affirmed.*[1]

LITCHFIELD *v.* BALLOU.

1885. 114 *U. S.* 190.

This was a bill in chancery to enforce payment of moneys loaned to a municipality in violation of law, and for which it had been held that an action could not be maintained at law. *Buchanan* v. *Litchfield*, 102 U. S. 278. The facts making the case are stated in the opinion of the court.

John M. Palmer and *B. S. Edwards* for appellant.

D. T. Littler for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a decree in chancery of the Circuit Court for the Southern District of Illinois.

The suit was commenced by a bill brought by Ballou against the city of Litchfield. Complainant alleges that he is the owner of bonds issued by the city of Litchfield to a very considerable amount. That the money received by the city for the sale to him of these bonds was used in the construction of a system of water works for the city, of which the city is now the owner. He alleges that one Buchanan, who was the owner of some of these bonds, brought suit on them in the same court and was defeated in his action in the Circuit Court and in the Supreme Court of the United States, both of which courts held the bonds void.

He now alleges that, though the bonds are void, the city is liable to him for the money it received of him, and as by the use of that money the water works were constructed, he prays for a decree against the city for the amount, and if it is not paid within a reasonable time to be fixed by the court, that the water works of the city be

[1] "To permit a recovery upon a *quantum meruit* solely for a work which can be done only by authority of a statute, would necessarily lead to the conclusion that a statute might be wholly ignored, and the county bound, provided it received the worth of its money.

". . . The distinction must be kept in view between those cases which hold that a municipal corporation, which has received the benefit of money, labor, or property upon a contract made without due formality, and which is not prohibited by statute, is liable to the extent of the value of what has been received and appropriated, and those cases where the municipality has power to act only by virtue of a statute, and, in attempting to exercise the power, has failed to observe the statutory requirements. In the one class of cases the power to contract exists, while in the other the power to contract does not exist, because of the failure of the municipality to that which alone could give it such power." Robinson, C. J., in *Wrought-Iron Bridge Co.* v. *Board of Com'rs of Hendricks County*, Appellate Court of Indiana, A. D. 1898, 48 Northeastern Reporter, 1050, p. 1052. — Ed.

sold to satisfy the decree. The bill also charges that he was misled to purchase the bonds by the false statements of the officers, agents and attorneys of the city, that the bonds were valid. Other parties came into the litigation, and answers were filed. The answer of the city denies any false representations as to the character of the bonds, denies that all the money received for them went into the water works, but part of it was used for other purposes, and avers that a larger part of the sum paid for the water works came from other sources than the sale of these bonds, and it cannot now be ascertained how much of that money went into the works.

The case came to issue and some testimony was taken, the substance of which is that much the larger part of the money for which the bonds were sold was used to pay the contractors who built the water works, while a very considerable proportion of the cost of these works was paid for out of taxation and other resources than the bonds.

There is no evidence of any false or fraudulent representations by the authorized agents of the city.

The bonds were held void in the case of *Buchanan* v. *Litchfield*, 102 U. S. 278, because they were issued in violation of the following provision of the Constitution of Illinois:

"ARTICLE IX.

"SECTION 12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness."

It was made to appear as a fact in that case, that at the time the bonds were issued the city had a pre-existing indebtedness exceeding five per cent. of the value of its taxable property, as ascertained by its last assessment for State and county taxes.

The bill in this case is based upon the fact that the *bonds are* for that reason void, and it makes the record of the proceedings in that suit an exhibit in this. But the complainant insists that, though the bonds are void, the city is bound, *ex æquo et bono*, to return the money it received for them. It therefore prays for a decree against the city for the amount of the money so received.

There are two objections to this proposition: 1. If the city is liable for this money, an action at law is the appropriate remedy. The action for money had and received to plaintiffs' use is the usual and adequate remedy in such cases where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings

In this view the present bill fails for want of equitable jurisdiction.

2. But there is no more reason for a recovery on the *implied* contract to repay the money, than on the *express* contract found in the bonds.

The language of the Constitution is that no city, &c., "shall be allowed to become *indebted in any manner or for any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property." It shall not *become indebted.* Shall not incur any pecuniary liability. It shall not do this in *any manner.* Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose.* No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever.

If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.

Counsel for appellee in their brief, recognizing the difficulty here pointed out, present their view of the case in the following language:

"The theory of relief assumed by the bill is, that notwithstanding the bonds were wholly invalid, and no suit at law could be successfully maintained either upon the bonds or upon any contract as such growing out of the bonds, yet as the City of Litchfield is in possession of the money received for the bonds, or, which is the same thing, its equivalent in property identified as having been procured with this money and having repudiated and disclaimed its liability in respect of the bonds, it must, upon well established equitable principles, restore to the complainants what it actually received, or at least so much of what it received as is shown now to be in its possession and in its power to restore."

If such be the theory of the bill, the decree of the court is quite unwarranted by it. The money received by the city from Ballou has long passed out of its possession, and cannot be restored to complainant. Neither the specific money nor any other money is to be found in the safe of the city or anywhere else under its control. And the decree of the court, so far from attempting to restore the specific money, declares that there is due from the City of Litchfield to complainants a sum of money, not that original money, but a sum equal in amount to the bonds and interest on them from the day of their issue. Is this a decree to return the identical money or property received, or is it a decree to pay as on an implied contract the sum received, with interest for its use?

As regards the water works, into which it is said the money was transmuted; if the theory of counsel is correct, the water works should have been delivered up to plaintiffs as representing their money, as property which they have purchased, and which, since the

contract has been declared void, is *their property*, as representing their money. In this view the restoration to complainants of the property which represents their money puts an end to obligations on both sides growing out of the transaction. The complainants, having recovered what was theirs, have no further claim on the city. The latter having discharged its trust by returning what complainant has elected to claim as his own, is no longer liable for the money or any part of it.

But here also the decree departs from what is now asserted to be the principle of the bill. Having decreed an indebtedness where none can exist, and declared that complainant has a *lien* on, not the ownership of, the water works, it directs a sale of the water works for the payment of this debt and the satisfaction of this lien.

If this be a mode of pursuing and reclaiming specific property into which money has been transmuted, it is a new mode. If the theory of appellee's counsel be true, there is no *lien* on the property. There is no debt to be secured by a lien. That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the property of complainant, into which *his* money, not the city's, has been invested, for the reason that there was no debt created by the transaction.

The money received on the bonds having been expended, with other funds raised by taxation, in erecting the water works of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the city an implied assumpsit for money had and received. The holders of the bonds and agents of the city are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared.

But there is a reason why even this cannot be done.

Leaving out of view the question of tracing complainants' money into these works, it is very certain that there is other money besides theirs in the same property. The land on which these works are constructed was bought and paid for before the bonds were issued or voted. The streets through which the pipes are laid is public property into which no money of the complainants entered. Much, also, of the expense of construction was paid by taxation or other resources of the city. How much cannot be known with certainty, because, though the officers of the city testify that on the books a separate water-works account was kept, there is no evidence that the funds which went to build these works are traceable by those books to their source in any instance.

If the complainants are after the money they let the city have, they must clearly identify the money, or the fund, or other property which represents that money, in such a manner that it can be reclaimed and

delivered without taking other property with it, or injuring other persons or interfering with others' rights.

It is the consciousness that this cannot be done which caused the court and counsel to resort to the idea of a debt and a lien which cannot be sustained. A lien of a person on his own property, which is and has always been his, in favor of himself, is a novelty which only the necessities of this case could suggest.

Another objection to this assertion of a right to the property is, that the bondholders, each of whom must hold a part of whatever equity there is to the property, are numerous and scattered, and the relative amount of the interest of each in this property could hardly be correctly ascertained. The property itself cannot be divided; its value consists in its unity as a system of water works for the city. Without the land and the use of the streets, the value of the remainder of the plant is gone. In these complainants can have no equity.

The decree of the court is reversed and the case remanded, with directions to dismiss the bill.

MR. JUSTICE HARLAN dissented.